

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





75-4263

---

---

**United States Court of Appeals**

FOR THE SECOND CIRCUIT

---

NIAGARA MOHAWK POWER CORPORATION,  
*Petitioner,*

—v.—

FEDERAL POWER COMMISSION,  
*Respondent,*

TOWN OF MASSENA, NEW YORK,  
*Intervenor.*

---

ON APPEAL FROM AN ORDER OF THE  
FEDERAL POWER COMMISSION

---

---

**JOINT APPENDIX**

---

---

SHEA GOULD CLIMENKO KRAMER & CASEY  
330 Madison Avenue  
New York, New York 10017

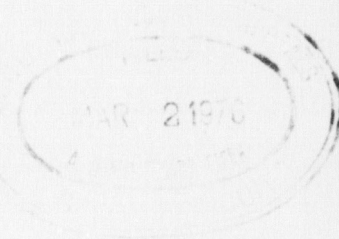
LAUMAN MARTIN, Esq.  
300 Erie Boulevard West  
Syracuse, New York 13202  
*Attorneys for Petitioner*  
*Niagara Mohawk Power Commission*

DREXEL D. JOURNEY, Esq.  
ALLAN ABBOTT TUTTLE, Esq.  
ALLAN M. GARTEN, Esq.  
Washington, D. C. 20426  
*Attorneys for Respondent*  
*Federal Power Commission*

DUNCAN, BROWN, WEINBERG & PALMER  
1700 Pennsylvania Avenue, N. W.  
Washington, D. C. 20006  
*Attorneys for Intervenor*  
*Town of Massena, New York*

---

---



PAGINATION AS IN ORIGINAL COPY



# INDEX TO APPENDIX

	<u>Page</u>
Certification of the Record by the Federal Power Commission .....	1a
Protest and Petition to Intervene of Massena Before the Federal Power Commission .....	5a
Exhibit A .....	19a
Exhibit B .....	27a
Exhibit C .....	29a
Exhibit D .....	31a
Exhibit E .....	33a
Exhibit F .....	35a
Exhibit G .....	36a
Exhibit H .....	38a
Exhibit I .....	39a
Niagara Mohawk's Answer in Opposition to Requested Intervention by Massena .....	40a
Amended Answer of Consolidated Edison .....	49a
Federal Power Commission Order Issued June 2, 1975 .....	54a
Town of Massena Application for Rehearing .....	59a
Federal Power Commission Order Issued July 23, 1975 .....	66a
Motion to Dismiss Investigation .....	70a
Appendix A .....	82a
Federal Power Commission Order Issued September 25, 1975 .....	84a
Application of Niagara Mohawk for Rehearing .....	87a
Massena's Response to Niagara Mohawk's Request for Deferment .....	98a
Federal Power Commission Order Issued November 13, 1975 .....	105a

INDEX TO APPENDIX

	<u>Page</u>
Motion of Massena to Extend Procedural Dates .....	111a
Notice and Application for Depositions .....	115a
Appendix A .....	130a
Appendix B .....	131a
Appendix C .....	132a
Petition for Review .....	133a
Federal Power Commission Letter of December 3, 1975 .....	135a
Federal Power Commission Order Issued December 22, 1975 .....	137a
Massena's Motion to Extend Procedural Dates .....	140a
Application for an Order Directing the Establishment of Physical Connection of Facilities .....	144a
Court of Appeals Order Granting Town of Massena Leave to Intervene.....	159a



CERTIFICATION OF THE RECORD  
BY THE FEDERAL POWER COMMISSION

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

Niagara Mohawk Power Corporation, )  
Petitioner, )  
v. )  
Federal Power Commission, )  
Respondent. )

No. 75-4263

CERTIFICATE OF RECORD IN LIEU OF RECORD

Pursuant to the provisions of Section 313(b) of the Federal Power Act (49 Stat. 860, 16 U.S.C. 8251), Section 2112 of Chapter 133 of Title 28 of the United States Code, as amended by the Act of August 28, 1958, 72 Stat. 941-942, and Rule 17 of the Federal Rules of Appellate Procedure, the Federal Power Commission hereby certifies that the materials listed and described below are (1) the order complained of, entitled Niagara Mohawk Power Corporation, Docket No. E-9379, issued September 25, 1975, (2) the complete record upon which such order was entered, and (3) the application for rehearing, the motion for stay and responses thereto, together with the Commission's action thereon.

CERTIFICATION OF THE RECORD  
BY THE FEDERAL POWER COMMISSION

- 2 -

<u>Description</u>	<u>Certified Pagination</u>
Niagara Mohawk Power Corp. letter submitting for filing as a rate schedule a transmission agreement between Niagara and Consolidated Edison Co. of New York, received 4/14/75	1-12
Notice of Tariff Filing, issued 4/18/75	13-14
Town of Massena, New York Protest and Petition to Intervene, Motion to Reject Rate Schedule Filing, or, in the Alternative to Suspend the Operation of the Rate Schedule for Five Months and to Order a Hearing, and for Other Appropriate Relief, received 5/5/75	15-47
Con Edison Answer to filing last above, received 5/16/75	48-52
Con Edison Amended Answer, received 5/19/75	53-58
Niagara Mohawk Answer in Opposition to Requested Intervention by Town of Massena, received 5/19/75	59-67
Order Accepting for Filing and Approving Proposed Rate Schedule, Granting Petition to Intervene, and Denying Motion of Town of Massena, issued 6/2/75	68-72
Town of Massena Application for Rehearing and/or Clarification of Order above, received 6/23/75	73-79
Order Granting Rehearing* and Clarifying Prior Order, issued 7/23/75	80-83
Niagara Mohawk Motion to Dismiss Investigation Directed by Order last above, received 8/14/75	84-97



CERTIFICATION OF THE RECORD  
BY THE FEDERAL POWER COMMISSION

- 3 -

<u>Description</u>	<u>Certified Pagination</u>
Town of Massena Memorandum in Opposition to Motion to Dismiss Investigation, received 8/27/75	98-104
Order Denying Motion to Dismiss Investigation, issued 9/25/75	105-107
Niagara Mohawk Application f r Rehearing of Order last above, Plus Request for Deferment and Modification of Ordering Clause (B) of Order issued July 23, received 10/14/75	108-118
Town of Massena Response to Niagara Mohawk filing last above, received 10/21/75	119-125
Order Denying Rehearing and Modifying Procedural Dates, issued 11/13/75	126-131
Niagara Mohawk Application for Stay of Order issued last above, received 11/26/75	132-134
Town of Massena Memorandum in Opposition to Motion for Stay, received 12/3/75	135-140
Niagara Mohawk Reply to Memorandum filed last above, received 12/11/75	141-145
Order Denying Application for Stay, issued 12/22/75.	146-148

By the Commission.

In witness whereof I have hereunto  
subscribed my name and caused the seal  
of the Federal Power Commission to be  
affixed this 3rd day of February 1976,  
at Washington, D. C.

Secretary



( CERTIFICATION OF THE RECORD  
BY THE FEDERAL POWER COMMISSION )

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing by mailing copies to counsel at the addresses below:

Lauman Martin  
300 Erie Boulevard West  
Syracuse, New York 13202

Bernard D. Fischman  
Shea Gould Climenko Kramer & Casey  
330 Madison Avenue  
New York, New York 10017

Wallace L. Duncan  
Fredrick D. Palmer  
Duncan, Brown, Weinberg & Palmer  
1700 Pennsylvania Ave., N.W.  
Washington, D. C. 20006

Allan M. Garten  
Attorney

Federal Power Commission  
Washington, D. C. 20426  
202/275-4258  
February 3, 1976

PROTEST AND PETITION TO INTERVENE  
OF MASSENA

UNITED STATES OF AMERICA  
FEDERAL POWER COMMISSION

Niagara Mohawk Power Corporation ) Docket No. E-9379

PROTEST AND PETITION TO INTERVENE OF THE TOWN  
OF MASSENA, NEW YORK, MOTION TO REJECT RATE  
SCHEDULE FILING, OR, IN THE ALTERNATIVE TO  
SUSPEND THE OPERATION OF THE RATE SCHEDULE FOR  
FIVE MONTHS AND TO ORDER A HEARING, AND FOR  
OTHER APPROPRIATE RELIEF

Comes now the Petitioner, the Town of Massena, New York  
(Massena), by and through counsel Fredrick D. Palmer, Duncan,  
Brown, Weinberg & Palmer, 1700 Pennsylvania Avenue, N. W.,  
Washington, D. C. 20006, with this Protest, Petition, and  
Motion pursuant to Section 1.8 of the Commission's Rules of  
Practice and Procedure.

The names and addresses of the persons to whom communica-  
tions concerning this proceeding should be addressed are as  
follows:

Fredrick D. Palmer, Esq.  
Wallace L. Duncan, Esq.  
Duncan, Brown, Weinberg & Palmer  
1700 Pennsylvania Avenue, N. W.  
Suite 777  
Washington, D. C. 20006

Charles Smith  
Town Supervisor  
Town Hall  
Massena, New York 13662

Eugene L. Nicandri, Esq.  
Lavigne & Nicandri  
57 East Orvis Street  
Massena, New York 13662



PROTEST AND PETITION TO INTERVENE  
OF MASSENA

As grounds for this Protest, Petition and Motion, Massena shows and alleges:

1. Massena is a municipal corporation as defined under the laws of the State of New York, is located in the County of St. Lawrence, and lies adjacent to the St. Lawrence River. The population of Massena is approximately 16,000. Massena's economic base consists of three major industrial facilities with a recreational mix based on the St. Lawrence River and Lake St. Lawrence formed by a hydroelectric facility owned and operated by the Power Authority of the State of New York (PASNY).

2. Niagara Mohawk Power Corporation (Niagara Mohawk) currently serves electric power and energy to the residents of Massena at retail under rates, terms and conditions of service approved by or prescribed by the Public Service Commission of the State of New York. Under the laws of the State of New York, however, Massena may construct, lease, purchase, own, acquire, use and/or operate any public utility service within or without its territorial limits, for the purpose of furnishing to itself, or for compensation to its inhabitants, electric or other utility services by condemnation or otherwise. On May 30, 1974, pursuant to statutory authority, the residents of Massena approved a voter referendum authorizing the Town to acquire the electrical distribution facilities of Niagara Mohawk for the purpose of owning and operating a municipal electric system.

PROTEST AND PETITION TO INTERVENE  
OF MASSENA

- 3 -

3. Pursuant to the referendum Massena made a hard dollar offer to purchase Niagara Mohawk's facilities by letter dated November 12, 1974. A copy of the offer is attached hereto as Exhibit A. As a result of Niagara Mohawk's refusal to engage in meaningful negotiations, Massena filed a Petition for Condemnation Order in the County Court, County of St. Lawrence on March 13, 1975. That matter is still sub judice.

4. Massena is in a unique situation to benefit from the establishment of a municipally owned electric distribution system since it qualifies as a preference customer of PASNY power. Under the Niagara Redevelopment Act, 71 Stat. 401, 16 U.S.C., Section 836, PASNY is required to market at least fifty percent (50%) of the output of the Niagara Power Project to preference customers including public agencies and non-profit rural cooperatives. In this regard, Section (b)(1) of the Act provides that:

In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural customers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance.

In recognition of the fact that all such power available to preference customers may not be needed or utilized at the outset of the marketing program, Congress permitted interim sales of



PROTEST AND PETITION TO INTERVENE  
OF MASSENA

- 4 -

this power to non-preference customers (including private, investor owned utilities like Niagara Mohawk) but required the licensee (PASNY) to:

...make flexible arrangements and contracts providing for the withdrawal upon reasonable notice and fair terms of enough power to meet the reasonably foreseeable needs of the preference customers. (Section (b)(1)).

Accordingly, all PASNY contracts with its non-preference customers contain withdrawal provisions to ensure that PASNY provide for the growing electric loads of existing preference customers and provide service to new preference customers as qualified applications for allocations are approved.

While the Niagara Redevelopment Act does give PASNY some latitude in establishing the notice and terms of withdrawal, the mandate to market one-half of the Niagara project power to preference customers is clear and unmistakable. PASNY has little discretion in honoring a bona fide request for service or an increase in allocation by a preference customer or prospective customer who is otherwise qualified.

PASNY does have some discretion in determining whether a potential customer is within an "economic transmission distance" of the project facilities. However, in light of the fact that PASNY already markets power throughout the State of New York, Vermont, and parts of Pennsylvania, it is inconceivable that PASNY could successfully contend that any municipality in New York State is beyond the economic area for receiving PASNY power.

PROTEST AND PETITION TO INTERVENE  
OF MASSENA

- 5 -

The Power Authority Act of the State of New York also contains preference provisions which extend and apply to "domestic and rural consumers to whom power can economically be made available." (Section 1005.) While the preference provisions of this Act are somewhat equivocal in comparison to comparable provisions of the Niagara Redevelopment Act, the Power Authority Act does provide that:

...the Authority shall in addition to other methods which it may find advantageous make provision so that municipalities and other political subdivisions of the state now or hereafter authorized by law to engage in the distribution of electric power may secure a reasonable share of the power generated by such projects, and shall sell the same or cause the same to be sold to such municipalities and political subdivisions, at prices representing cost of generation, plus capital and operating charges, plus a fair cost of transmission... (Section 1005.5). (Emphasis supplied).

Thus, the Power Authority Act, including the portion quoted above, applies to the marketing of both Niagara and St. Lawrence Project power. Thus, additional power from the



PROTEST AND PETITION TO INTERVENE  
OF MASSENA

- 6 -

St. Lawrence Project may be available in the future if PASNY, through persuasion or litigation, were to amend its marketing policy respecting the application of these preference provisions.

Responsible PASNY officials have advised representatives of Massena that, upon formation of a municipal electric system and proper applications to PASNY, the Town and Village would qualify for and will receive an allocation of preference power (See Exhibit B). PASNY officials have further assured Massena that PASNY power will be available on or about January 1, 1976 to serve all of Massena's needs. Power sold by PASNY to Massena will, of course, be much cheaper than power now sold at retail by Niagara Mohawk to Massena customers. This is due to the fact that Massena purchased PASNY power will be priced at rates geared to hydroelectric generation at cost while Niagara Mohawk sells power priced at rates geared to a mix of generation (fossil and hydro) with a retail markup added.

5. However, before Massena can take power from PASNY in January of 1976, contractual arrangements will have to be entered into with Niagara Mohawk for delivery over its lines. The subject of delivery has been broached with Niagara Mohawk but to date the Company has refused to entertain the request on a meaningful basis, notwithstanding that Massena has offered to reasonably compensate Niagara Mohawk for the service. For example, on February 13, 1975, the undersigned inquired by letter to the Company:

PROTEST AND PETITION TO INTERVENE  
OF MASSENA

- 7 -

2. Is the Company willing to consummate negotiations for the use of the Company's facilities to deliver PASNY power to the Town on a basis that provides the Company a reasonable rate of return on its investment (computed in accordance with generally prevailing State and/or Federal regulatory principles)? (Exhibit C).

Niagara Mohawk responded:

(2) If at some future time Niagara Mohawk is to be obligated to supply transmission service to a Town of Massena electric distribution system, Niagara Mohawk's charges for such service obviously must be fixed within the limitations applicable thereto imposed by any regulatory agency having jurisdiction in the premises. (Letter dated February 21, 1975, Exhibit D).

By further letter dated February 25, 1975 (Exhibit E), in addressing the Company's response on transmission, the undersigned stated:

3. Your response concerning transmission services is absolutely nonresponsive and can only be construed as negative. We will treat it as such.

The Company responded:

Your letter to me of February 25, 1975, apparently limits compensation to Niagara Mohawk for the possible loss of certain of its Town of Massena facilities and consequential damages to its then retained electric operations to an amount something less than \$4,500,000, as well as acceptance of conditions (i.e., relating to transmission) stated in the Town proposal transmitted November 13, 1974. These predetermined limitations are necessarily something Niagara Mohawk cannot accept for negotiation purposes. (Letter dated March 6, 1975, Exhibit F).

Following receipt of Niagara Mohawk's March 6 response, Massena instituted a condemnation action in New York. Thereafter



PROTEST AND PETITION TO INTERVENE  
OF MASSENA

- 8 -

Massena and Niagara Mohawk continued to exchange correspondence on the transmission question. On April 4, 1975, the undersigned informed the Company that it viewed the Company's refusal to agree to transmission as a violation of the antitrust laws under Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) (Exhibit G). On April 10, 1975, the Company responded:

I am not aware that Niagara Mohawk to date has refused or "continues to refuse to transmit" PASNY hydroelectric power for the prospective account of the Town of Massena. (Exhibit H).

Finally, on April 30, 1975, the undersigned again questioned the propriety of the Company's continued evasiveness and refusal to negotiate transmission in the face of a specific request and informed Niagara Mohawk that it was and is Massena's intention to bring the Company's intransigence to the attention of "appropriate regulatory agencies". (Exhibit I). The Company has yet to respond.

6. Because of Niagara Mohawk's refusal to wheel PASNY power to Massena, Massena was chagrined to learn that the Company, on a regular basis, enters into transmission agreements with other investor owned utilities in the State of New York. The latest example of these matter of course transactions is the agreement before the Commission in this docket, lodged with the Commission on April 18, 1975. It is the contention of Massena in this docket that Niagara Mohawk's latest filing is an integral part of an interstate program and combination to unlawfully monopolize the electric utility industry.

PROTEST AND PETITION TO INTERVENE  
OF MASSENA

- 9 -

7. It is settled that this Commission must consider anticompetitive allegations where there is a nexus between the activity complained of, the authority of the Commission to award relief and the interests of the party lodging a complaint. Certain facts alleged here are not subject to dispute and establish the requisite nexus for Commission action:

- (a) Massena is exercising a legal right to establish a municipal electric system;
- (b) PASNY will provide low cost hydro-electric power to Massena once a municipal electric system is established;
- (c) If Massena is to have full benefits from PASNY power from approximately January 1, 1976 on, Niagara Mohawk must cooperate in providing transmission service;
- (d) Niagara Mohawk's refusal to cooperate jeopardizes Massena's goal of establishing a municipal power system since the voters, in passing favorably on the referendum, anticipated that low cost PASNY power would be available on an expeditious basis.
- (e) Niagara Mohawk has yet to affirmatively commit itself on transmission and has advanced no technical reason for refusing to so commit;
- (f) The present filing is one of many wherein Niagara Mohawk, as a matter of course, agrees to make its transmission lines available to investor owned utilities;
- (g) The present filing, if accepted and approved by the Commission, will financially strengthen Niagara Mohawk.

The following facts Massena believes to be true and asserts its right to establish before the Commission in an evidentiary proceeding:



PROTEST AND PETITION TO INTERVENE  
OF MASSENA

- 10 -

(h) Niagara Mohawk or its representatives have stated informally and will contend before New York State courts that Massena is without authority to institute condemnation proceedings since, as a condition precedent, arrangements must be made for delivery of PASNY power and no such arrangements can be made until the Company agrees to wheel;<sup>1/</sup>

(i) Niagara Mohawk's statements to Massena on the transmission question to date establish a refusal to wheel;

(j) The revenues Niagara Mohawk will receive if the Commission accepts and approves this filing will be unlawfully used by the Company to strengthen its monopolistic position over transmission in the Massena service area to the detriment of Massena;

(k) The revenues Niagara Mohawk will receive if the Commission accepts and approves this filing will be unlawfully used by the Company in an effort to resist the establishment of a municipal electric system in Massena through advertising, legislative efforts in New York, and in its dealings with PASNY;

(l) The agreement embodied in this filing is an integral part of an ongoing program and combination to unlawfully monopolize the electric utility industry to the detriment of consumer owned power systems or the establishment thereof, including Massena.

7. Massena does not ask this Commission to order Niagara Mohawk to transmit PASNY power in recognition that this Commission

---

<sup>1/</sup> This allegation is based on a phone call made by Niagara Mohawk's counsel to bond counsel for Massena wherein a request was made to reconsider bond counsel's opinion on Massena's authority to proceed in condemnation where no arrangement had been made for transmission of PASNY power.

PROTEST AND PETITION TO INTERVENE  
OF MASSENA

- 11 -

has no authority to do so. Cf. Otter Tail Power Co. v. United States, supra. Massena does ask for a hearing on the anticompetitive allegations raised and a rejection of the filing, assuming Massena can establish, through probitive evidence, its claims.

9. This Commission is no stranger to the allegations made herein. While the Commission has not always been eager to consider anticompetitive complaints and protests lodged by municipal utilities, it has become apparent that the courts are now requiring a full airing of the practices complained of before the Commission. Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973); Conway Corporation v. FPC, 510 F.2d 1264 (D. C. Cir., 1975); City of Huntingburg, Indiana v. FPC, 498 F.2d 778 (D. C. Cir., 1974).<sup>2/</sup>

10. Here the Commission has ample authority to grant the relief requested (rejection of the rate filing) and the relief requested is appropriate in light of the allegations made; the activities complained of are allegedly in violation of the antitrust laws of the United States and Section 10(h) of the Federal Power Act; the filing here, if approved, will allegedly

---

<sup>2/</sup> Northern California Power Agency v. Federal Power Commission, F.2d (D. C. Cir., No. 73-1765, March 6, 1975), provides further support for Massena's contention here. While the Court there affirmed a Commission refusal to consider antitrust issues under Section 205, the Court was careful to limit its holding "(o)n the record in this case..." since "(w)hile the consequences of approving the rate schedules could possibly further the alleged anticompetitive scheme, NCPA neither challenged the rates nor asserted their relevance to the alleged scheme." Slip opinion at 10. In the present instance, Massena has alleged with specificity "...the (anticompetitive) consequences of approving the rate schedules..."



PROTEST AND PETITION TO INTERVENE  
OF MASSENA

- 12 -

strengthen Niagara Mohawk in the pursuit of an anticompetitive scheme to the detriment of Massena; and the granting of relief by Massena would be in the public interest in furtherance of the policies expressed in the antitrust laws and under the Federal Power Act. It is submitted that under these circumstances the Commission must at least hold an evidentiary hearing on the issues raised.

WHEREFORE, for the foregoing reasons, Massena respectfully requests that the Commission (1) grant Massena intervention as a full party to this proceeding; (2) reject the filing, or in the alternative withhold acceptance for filing of the rate schedule pending full investigation and hearing, or, in the alternative suspend the operation of the filing for five months and order a hearing on the issues raised herein; (3) order an immediate conference of the parties for the purpose of negotiating an interim settlement to avoid injury to Consolidated Edison; and (4) take such other action as is necessary and appropriate.

Respectfully submitted,



Fredrick D. Palmer

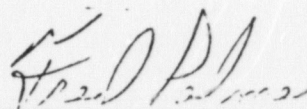
Duncan, Brown, Weinberg & Palmer  
1700 Pennsylvania Avenue, N. W.  
Suite 777  
Washington, D. C. 20006

Dated: 5/15/75

PROTEST AND PETITION TO INTERVENE  
OF MASSENA

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing  
Protest, Petition and Motion upon all parties of record by  
depositing copies thereof in the United States mail, postage  
pre-paid, this 5th day of May, 1975.



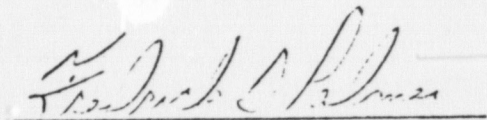
Fredrick D. Palmer

PROTEST AND PETITION TO INTERVENE  
OF MASSENA

## VERIFICATION

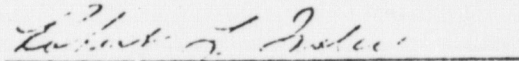
City of Washington :  
District of Columbia : ss:

FREDRICK D. PALMER, being first duly sworn, deposes and says that he is the attorney for the Town of Massena, and that he is authorized to execute and file the foregoing Protest, Petition, and Motion; that he has read said petition and is familiar with the contents thereof; and that all statements of fact therein set forth are true and correct, to the best of his knowledge, information and belief.



Fredrick D. Palmer

Subscribed and sworn to before me  
this \_\_\_\_\_ day of May, 1975.



Notary Public

My Commission expires \_\_\_\_\_  
My Commission Expires August 14, 1979



EXHIBIT A TO PETITION  
AND PROTEST OF MASSENA

Exhibit A

Offer to Purchase Electric Properties of the  
Niagara Mohawk Power Company by the  
Town of Massena, New York

Pursuant to the authority vested in the Town of Massena, Massena, New York by the registered voters thereof in a special referendum held May 30, 1974, Massena hereby tenders this OFFER to purchase the electric business and real and personal properties, herein after defined, of Niagara Mohawk Power Company, (Company) within the territorial limits of Massena and immediately adjacent areas. As used herein, the term Utility Properties shall mean those properties described in Exhibit A, attached hereto and incorporated by reference as though fully set forth at length, excluding those facilities specifically described under EXCLUSIONS in said Exhibit A.

1. Massena hereby OFFERS to pay the Company the following:

a. \$2,352,000 for a clear title to all the Utility Properties as defined in attached Exhibit A.

b. \$448,000 to compensate for all severance costs and damages that the Company will incur as a result of Massena's purchasing the Utility Properties as defined in attached Exhibit A.

c. A reasonable amount not to exceed \$125,000 for the book-recorded costs of all additions to the Utility Properties defined in Exhibit A less retirements which may be made by the Company between December 31, 1973 and the date of transfer of ownership of the Utility Properties from the Company to Massena.

2. Massena hereby further OFFERS the Company:

a. To enter into an agreement with the Company for the delivery of power through the Company's Browning and Andrews substa-



EXHIBIT A TO PETITION  
AND PROTEST OF MASSENA

tions and certain 115-kV transmission lines and facilities for transforming and delivering power from the Power Authority of the State of New York to Massena on terms and conditions mutually agreeable to the parties; provided that Massena will be required to pay no more than reasonable charges for the service under generally recognized utility rate - making standards, and; provided further that any resulting contract between the parties will be for a time certain to accommodate the needs of Massena and the Company.

b. To make reasonable and timely arrangements for the take-over of the Utility Properties with respect to service to customers affected by the changes in points of supply to the distribution lines crossing the boundaries of Massena to the end that customer service is maintained and the least construction cost effected in establishing separate electric systems to serve the service areas of Massena and the Company, respectively.

c. To assume the Company's contractual obligations arising from the Company's joint ownership of poles, contact rentals and any other existing arrangements with respect to the Properties and the Company's business related thereto.

d. For a price of \$1.00, to provide rights-of-way and easements to the Company for the installation of a substation addition adjacent to and connected with the Andrews Substation and 4.8-kV lines emanating therefrom to serve the Company's customers outside the boundaries of Massena, but only to the extent that it is within Massena's control to secure said rights-of-way and easements.

EXHIBIT A TO PETITION  
AND PROTEST OF MASSENA

3. In return for this OFFER, if accepted, the Company shall deliver to Massena:

a. Valid title to the Utility Properties and all books, accounts and records relating thereto and relating to the operation of an electric utility business.

b. The aggregate principal amount of customers' deposits together with accrued interest received by the Company for electric service to those customers within Massena. After notice to Massena, the Company will be entitled to collection and possession of any customer deposit received by the Company if the Company is unable to collect any customer bill for services rendered in Massena within 6 months following the Company's cessation of service to those customers.

4. This OFFER is subject to adjustment for any substantial damage to or destruction of the Utility Properties from the date hereof to the date title to the Utility Properties is transferred to Massena.

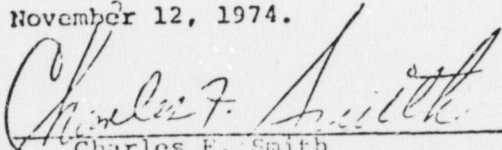
5. This OFFER is valid until December 15, 1974. The Company's acceptance of this OFFER on or before December 15, 1974 will commit both Massena and the Company to taking all steps necessary to perform its obligations hereunder so that transfer of the Utility Properties can be completed by no later than October 1, 1975 and that earnest negotiations to reach an agreement on those matters enumerated in Paragraphs 2(a), (b), (c), and (d) will commence with the Company's acceptance of this OFFER with the intent of both the Company and Massena to finalize all agreements by March 15, 1975.

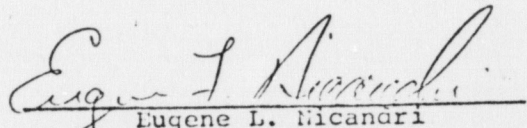


EXHIBIT A TO PETITION  
AND PROTEST OF MASSENA

It is the intention of Massena to continue to negotiate with the Company on those matters set forth in Paragraphs 2(a), (b), (c), and (d) notwithstanding that Massena and the Company fail to reach agreement on the matters enumerated in Paragraphs 1(a), (b), and (c).

November 12, 1974.

  
Charles F. Smith  
Town Supervisor

  
Eugene L. Nicandri  
Town Attorney

---

EXHIBIT A TO PETITION  
AND PROTEST OF MASSENA

EXHIBIT A

To Offer by Massena (1)

ELECTRIC PROPERTIES TO BE  
PURCHASED BY MASSENA

All electric utility facilities ("Properties") of the Niagara Mohawk Company ("Company") which are located in the Town and Village of Massena of the State of New York together with a certain transmission facility located in the Town of Louisville of the State of New York, including poles, wires, insulators, meters, switches, transformers, substations and all equipment and facilities, rights of way, real and personal property of every kind used as a part of said Properties, except those properties, equipment and facilities expressly excluded as hereinafter set forth under the designation of "EXCLUSIONS", said Properties being the following:

1. All Properties in said areas which are presently operating at a nominal voltage of not more than 23,000 volts, including but limited to the following:
  - a. A certain 23,000-volt line designated by the Company as T-24.

---

(1) - Based on detailed inventory supplied by Power Company and identified as Stone & Webster Inventory, subject to subsequent verification and the following exceptions:

- 1) Andrews Substation, 2) Alcoa Substation, 3) Transmission Line T-302, 4) Transmission Line T-307, 5) Transmission Line T-310, 6) Account #389 General Land, 7) Account #390 General Structures.



EXHIBIT A TO PETITION  
AND PROTEST OF MASSENA

- b. A certain 23,000-volt line designated by the Company as T-120, including the portion thereof in the Town of Louisville.
  - c. A 23,000-volt to 4,800-volt substation designated by the Company as Massena Village.
  - d. A 23,000-volt to 4,800-volt substation designated by the Company as Hatfield.
  - e. A certain 23,000-volt substation known as Massena Village Pumping.
2. All rights, title and interest of the Company in or to rights of way, franchises and easements pertaining to the Properties.

EXCLUSIONS

The following facilities are expressly excluded from the foregoing description:

- 1. All electric utility properties which are operating at a nominal voltage in excess of 23,000 volts, including the following:
  - a. 115,000-volt transmission lines extending into, through and out of the Town and Village of Massena and terminal facilities related thereto.
  - b. The 115,000-volt switching station and substation designated by the Company as Andrews, in its entirety.
  - c. 115,000-volt facilities owned by the Company in the Alcoa Substation.
  - d. All office, warehouse and/or service buildings, office

EXHIBIT A TO PETITION  
AND PROTEST OF MASSENA

or warehouse furniture and equipment, transportation and work equipment, stores equipment, tools, shop and garage equipment, laboratory equipment, power operated equipment, communication equipment and other general property not directly associated with the facilities to be purchased.

- e. Materials and supplies accounted as such by the Company.
- f. Contractual arrangements and land and land rights pertaining to a. through c. above, [including, notwithstanding, land and land rights held for future use.]



# EXHIBIT A TO PETITION AND PROTEST OF MASSENA

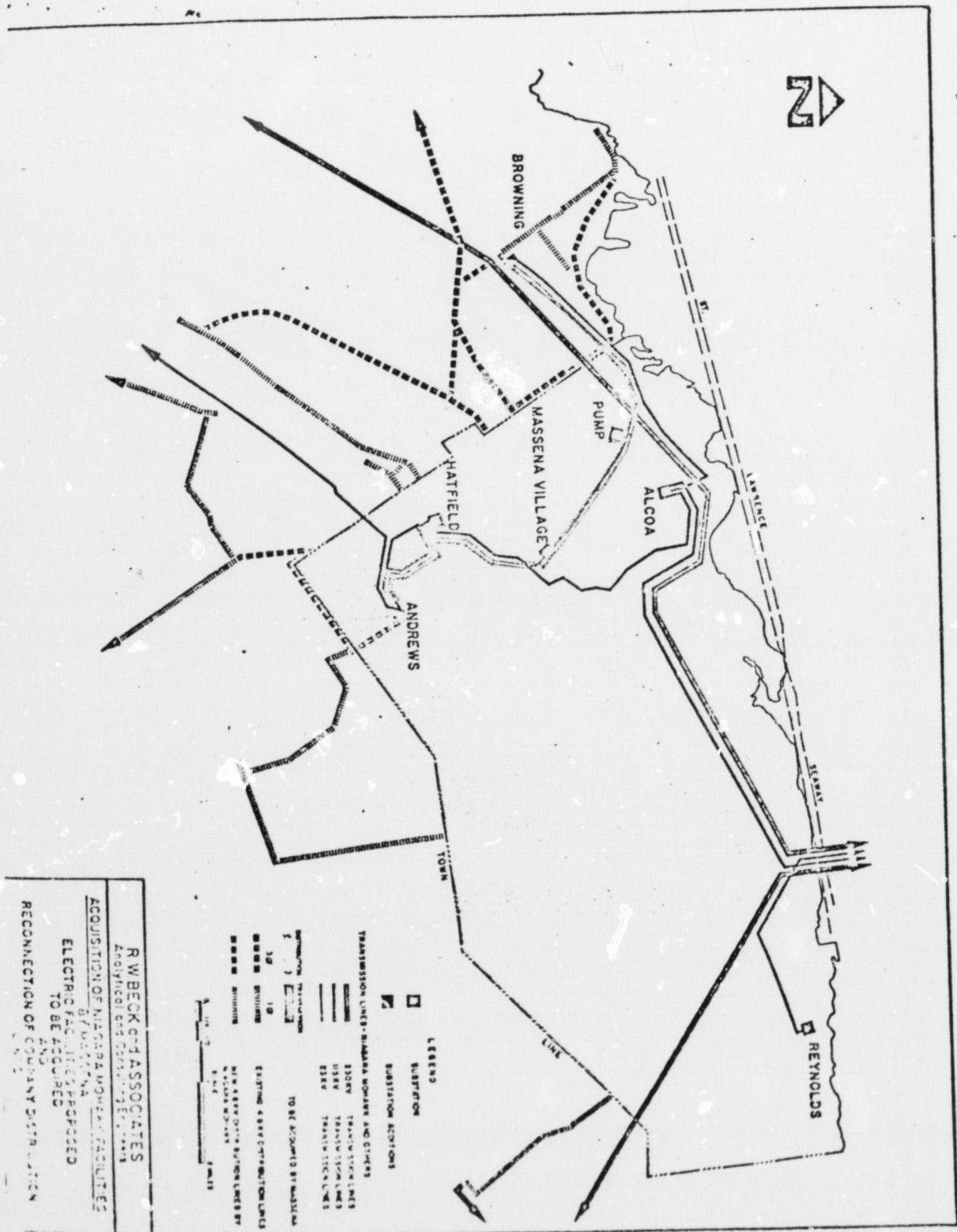


EXHIBIT B TO PETITION  
AND PROTEST OF MASSENA

Exhibit B

POWER AUTHORITY OF THE STATE OF NEW YORK  
10 COLUMBUS CIRCLE NEW YORK, N. Y. 10019  
(212) 265-6510

## TRUSTEES

JAMES A. FITZPATRICK  
CHAIRMAN

GEORGE L. INGALLS  
VICE CHAIRMAN

WILLIAM J. RONAN

RAYMOND J. LEE



GEORGE T. BERRY  
GENERAL MANAGER  
AND CHIEF ENGINEER

SCOTT B. LILLY  
GENERAL COUNSEL

WILBUR L. GRONBERG  
ASSISTANT GENERAL  
MANAGER - ENGINEERING

JOHN W. BOSTON  
DIRECTOR OF  
POWER OPERATIONS

THOMAS F. MCCRANN, JR.  
CONTROLLER

July 1, 1974

Wallace L. Duncan, Esq.  
Duncan, Brown, Weinberg  
& Palmer, Esqs.  
Suite 777  
1700 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006

Dear Mr. Duncan:

We have your letter of June 3, 1974, to Mr. Berry. We were, of course, aware that the Town of Massena had authorized a bond issue for the purpose of establishing a municipal electric system. We are ready to meet with representatives of the Town to consider the arrangements for the delivery of Authority electric service to the Town's electric system that will apply when the Town is in a position to receive the power and distribute it.

Enclosed is a copy of an Authority contract for the sale of power to the Village of Tupper Lake which will provide a general idea of the form of contract which the Authority is prepared to offer the Town. There will be differences as to points of delivery and contract demand, and the electric power provided will come primarily from Niagara Project power production. We will prepare a draft of contract for the Town's consideration as soon as the necessary details have been worked out. The Authority's Trustees will consider the Town's application in terms of the proposed contract when it has been approved by the Town and the Town has agreed to sign it.



28a  
EXHIBIT B TO PETITION  
AND PROTEST OF MASSENA

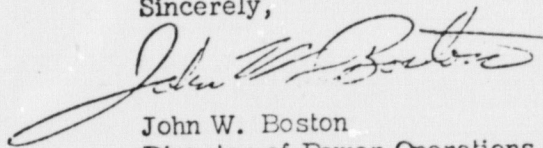
-2-

We expect to supply the amount of power which the Town will need, up to 15 megawatts, initially, from Niagara Project power that our contracts with Niagara Mohawk Power Corporation, New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation permit us to withdraw in the next 24 months, of which 25 megawatts will become available on each of the dates of January 1, 1975, December 31, 1975 and January 1, 1976. We expect the first 25 megawatts to be preempted by other requirements, but we can supply 15 megawatts out of the 50 to be available at the end of 1975. There may be some possibilities, contingent on other requirements and other future developments, for delivery to the Town earlier in 1975 if the Town would be in a position to use the power sooner, but we did not offer any assurance of an earlier date than the end of 1975 in our letter of March 18, 1974, and we do not do so now.

Our existing arrangements for wheeling power over the Niagara Mohawk system call for wheeling charges as set forth in the Tupper Lake contract. We will discuss the application of these arrangements to service to the Town of Massena in the meeting on July 3.

The charge which the Authority will make for the use of its transmission facilities has not yet been determined but will be specified in due course as provided in Article IV of the enclosed illustrative contract.

Sincerely,



John W. Boston  
Director of Power Operations

Att.

cc:  
Mr. George T. Berry

EXHIBIT C TO PETITION  
AND PROTEST OF MASSENA

Exhibit C

*Law Offices*

*Duncan, Brown, Weinberg & Palmer*

SUITE 777

WALLACE L. DUNCAN  
JON T. BROWN  
EDWARD WEINBERG  
FREDRICK D. PALMER  
FREDERICK L. MILLER, JR.

1700 PENNSYLVANIA AVENUE, N. W.  
WASHINGTON, D. C. 20006  
202 296-4325

CHICAGO OFFICE  
JOSEPH V. KARAGANIS  
33 NORTH LA SALLE STREET  
CHICAGO, ILLINOIS 60602

February 13, 1975

Lauman Martin, Esquire  
Senior Vice President  
and General Counsel  
Niagara Mohawk Power  
Corporation  
300 Erie Boulevard West  
Syracuse, New York 13202

Dear Mr. Martin:

We are in receipt of your letter dated February 11, 1975,  
and herewith submit the following as a response.

We will respond to your specific inquiries numbered 2-4  
inclusive provided that you respond affirmatively to the follow-  
ing two inquiries:

1. Is the Company willing to consummate negotiations for transfer of ownership of the Company's facilities under financial constraints that may be imposed upon the Town of Massena by the bond resolution?
2. Is the Company willing to consummate negotiations for the use of the Company's facilities to deliver PASNY power to the Town on a basis that provides the Company a reasonable rate of return on its investment (computed in accordance with generally prevailing State and/or Federal regulatory principles)?

Your specific inquiry numbered 1 need not be answered by us. The figure arrived at was based in part on information supplied by you and in part on the conclusions of legal counsel as to the requirements of New York condemnation law for compensation of condemned utility properties. Your legal staff and retained counsel are equally capable of ascertaining the state of the condemnation law in New York and you obviously have the same figures we do on the cost of utility properties; particularly as the cost pertains to your own system.



EXHIBIT C TO PETITION  
AND PROTEST OF MASSENA

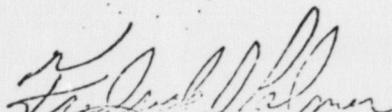
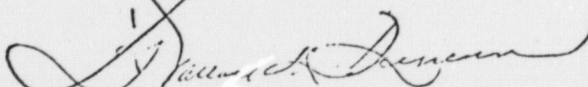
- 2 -

Our questions here, while direct, are necessary, in our view. While we have carried on a dialogue with the Company relative to the Town's acquisition of the facilities, the Company has yet to inform the Town of its stand on the issues central to the negotiations.

We do not expect the Company to abandon any legal rights it may have or perceive that it has. We continue to believe, however, that the actions of the Company, or of its representatives, have not yet demonstrated a willingness to expeditiously conclude negotiations. The contact of bond counsel for the Town outside of the normal channels of communication that have been established is, in our mind, one example of the Company's attitude.

We hope we are erroneous in this view and we hope that we receive from you shortly a positive response to this letter.

Sincerely,

  
Frederick D. Palmer  
Wallace L. Duncan

FDP:lz

cc: Eugene L. Nicandri, Esq.  
Honorable Charles Smith  
Honorable G. Laurence White, Mayor  
Milton Gould, Esq.  
John Hachl  
Robert G. Taylor

EXHIBIT D TO PETITION  
AND PROTEST OF MASSENA

Exhibit D

## NIAGARA MOHAWK POWER CORPORATION

NIAGARA  MOHAWK300 ERIC BOULEVARD WEST  
SYRACUSE, N.Y. 13202

February 21, 1975

Wallace L. Duncan, Esq.  
Frederick D. Palmer, Esq.  
Duncan, Brown, Weinberg & Palmer  
Suite 777  
1700 Pennsylvania Avenue, N. W.  
Washington, D.C. 20006

Dear Messrs. Duncan and Palmer:

Your letter dated February 13, 1975, among other things, poses two questions.

(1) I deem the "financial constraints that may be imposed upon the Town of Massena by the bond resolution" to mean that the 4.5 million dollars mentioned in the resolution puts a ceiling on the entire cost to the Town of Massena to enter the municipal electric distribution business, out of which payment of all costs, legal, engineering, financial and other, including payment to Niagara Mohawk, is to be made. If that is the question, I must advise you that Niagara Mohawk, at this preliminary stage of the negotiations in advance of the receipt by Niagara Mohawk of the make-up of the \$2,532,000 specified in the Town's offer and other data requested, can not bind itself to such an undetermined but limited ceiling on compensation to it for transfer of its electric properties and all other costs related thereto.

(2) If at some future time Niagara Mohawk is to be obligated to supply transmission service to a Town of Massena electric distribution system, Niagara Mohawk's charges for such service obviously must be fixed within the limitations applicable thereto imposed by any regulatory agency having jurisdiction in the premises.

I regret your present refusal to answer any part of the inquiries set forth in (1) of my letter to Mr. Duncan dated February 11, 1975.



EXHIBIT D TO PETITION  
AND PROTEST OF MASSENA

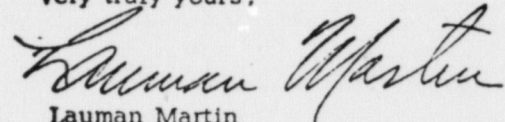
Wallace L. Duncan, Esq.  
Frederick D. Palmer, Esq.

-2-

February 21, 1975

It is not Niagara Mohawk's obligation to speculate on the make-up of the \$2,532,000 specified in the Town's offer accompanying the November 12, 1974 letter to Mr. Haehl from Mr. Nicandri.

Very truly yours,



Lauman Martin  
Senior Vice President  
and General Counsel

xc: Hon. G. Laurence White  
Hon. Charles Smith  
Eugene L. Nicandri, Esq.  
Robert G. Taylor

EXHIBIT F TO PETITION  
AND PROTEST OF MASSENA

Exhibit E

*Law Offices*  
*Duncan, Brown, Weinberg & Palmer*

SUITE 777

1700 PENNSYLVANIA AVENUE, N. W.

WASHINGTON, D. C. 20006

(202) 296-4325

TELEX 69-7445

WALLACE L. DUNCAN  
JON T. BROWN  
EDWARD WEINBERG  
FREDRICK D. PALMER  
FREDERICK L. MILLER, JR.  
JAY R. WEILLCHICAGO OFFICE  
JOSEPH V. KARAGANIS  
33 NORTH LA SALLE STREET  
CHICAGO, ILLINOIS 60602

February 25, 1975

Lauman Martin, Esquire  
Senior Vice President and  
General Counsel  
Niagara Mohawk Power Corporation  
300 Erie Boulevard West  
Syracuse, New York 13202

Dear Mr. Martin:

This letter is in response to your letter dated February 21, 1975.

1. We do not deem the negotiations at this point to be "preliminary". The Town of Massena has made a hard dollar offer, which it regards to be a compensatory amount, and the only response we have received from you is a request for additional information.
2. Your request for additional information is to us misplaced. It is your system that we will acquire by negotiation or otherwise, and you obviously have at least the same knowledge of your system that we do. To reiterate what you already know, the dollar amount offered is based on your own inventory, less appropriate exclusions as delineated in the Town's offer, and keyed to decisional case law in New York courts setting out the valuation of utility properties in condemnation actions.
3. Your response concerning transmission services is absolutely nonresponsive and can only be construed as negative. We will treat it as such.

The Town Council will meet on March 12, 1975, to consider a report by its counsel and consultants on the status of negotiations. If we do not receive a satisfactory response to our letter of February 13, 1975, by March 10, 1975, counsel and the consultants are prepared to recommend to the Town that appropriate legal action be taken to fulfill the mandate of the referendum on municipal power. By a satisfactory response, we envision a hard dollar counter offer by the Company together with a binding commitment to transmit PASNY power at a reasonable rate.

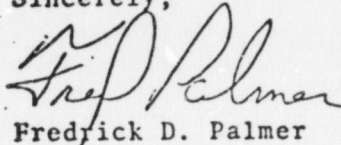


EXHIBIT E TO PETITION  
AND PROTEST OF MASSENA

- 2 -

Any such counter offer will be given serious consideration provided that it is in line with the 4.5 million dollar figure referenced in the bond resolution and the principles enumerated in the Town's written offer to the Company. An agreement in principle by the Town and the Company would then be followed by detailed negotiations for the orderly transfer of ownership of the Company's properties needed by the Town for the operation of its utility.

Sincerely,



Fredrick D. Palmer

FDP:lz

cc: Honorable Charles Smith  
Honorable G. Laurence White, Mayor  
Milton Gould, Esq.  
John Haehl  
Robert G. Taylor  
Eugene L. Nicandri, Esq.

EXHIBIT F TO PETITION  
AND PROTEST OF MASSENA

Exhibit F

NIAGARA MOHAWK POWER CORPORATION

NIAGARA  MOHAWK300 ERIE BOULEVARD WEST  
SYRACUSE, N.Y. 13202

March 6, 1975

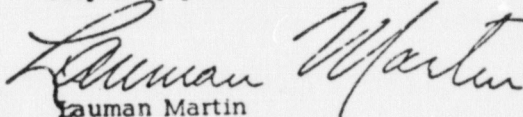
Frederick D. Palmer, Esq.  
Duncan, Brown, Weinberg & Palmer  
Suite 777  
1700 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006

Dear Mr. Palmer:

Your letter to me of February 25, 1975, apparently limits compensation to Niagara Mohawk for the possible loss of certain of its Town of Massena facilities and consequential damages to its then retained electric operations to an amount something less than \$4,500,000, as well as acceptance of conditions stated in the Town proposal transmitted November 12, 1974. These pre-determined limitations are necessarily something Niagara Mohawk cannot accept for negotiation purposes.

We continue to suggest a meeting at which there may be explored our open questions as submitted in our letter of February 11, 1975, which are appropriate to an understandable negotiation on your proposal of November 12, 1974.

Very truly yours,



Lauman Martin  
Senior Vice President  
and General Counsel

xc: Hon. Charles Smith  
Hon. G. Laurence White  
Milton Gould, Esq.  
Robert G. Taylor  
Eugene L. Nicandri, Esq.



EXHIBIT G TO PETITION  
AND PROTEST OF MASSENA

Exhibit G

*Law Offices*  
*Duncan, Brown, Weinberg & Palmer*

SUITE 777

1700 PENNSYLVANIA AVENUE, N. W.

WASHINGTON, D. C. 20006

(202) 296-4325

TELEX 69-7445

DBWP WSH

(WUD)

WALLACE L. DUNCAN  
JON T. BROWN  
EDWARD WEINBERG  
FREDRICK D. PALMER  
FREDERICK L. MILLER, JR.  
JAY R. WEILL

CHICAGO OFFICE  
JOSEPH V. KARAGANIS  
33 NORTH LA SALLE STREET  
CHICAGO, ILLINOIS 60602

April 4, 1975

Lauman Martin, Esquire  
Senior Vice President and  
General Counsel  
Niagara Mohawk Power Corporation  
300 Erie Boulevard West  
Syracuse, New York 13202

Dear Mr. Martin:

Please be advised that the Town of Massena, New York, intends to bring action against Niagara Mohawk Power Corporation for any damages caused the Town, trebled, in an appropriate Federal District Court under the anti-trust laws of the United States in the event the Company continues to refuse to transmit hydroelectric power generated by the Power Authority of the State of New York [PASNY] to a municipal electric system owned and operated by Massena. The Town will also seek injunctive relief compelling the transmission of said power. See Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

The measure of damages claimed will include, inter alia, the difference between the gross revenues derived by the Company from sales in Massena and the net cost of purchased power by Massena from PASNY plus a reasonable estimate of transmission charges for use of Company transmission lines.

Sincerely yours,

*Fredrick D. Palmer*  
Fredrick D. Palmer

FDP:tmg

37a

EXHIBIT G TO PETITION  
AND PROTEST OF MASSENA

---

-2-

cc: Honorable Charles Smith  
Honorable G. Laurence White, Mayor  
Milton Gould, Esquire  
Robert G. Taylor  
Eugene L. Nicandri, Esquire



EXHIBIT H TO PETITION  
AND PROTEST OF MASSENA

Exhibit H

NIAGARA MOHAWK POWER CORPORATION

NIAGARA  MOHAWK300 ERIE BOULEVARD WEST  
SYRACUSE, N. Y. 13202

April 10, 1975

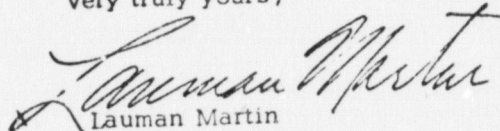
Fredrick D. Palmer, Esq.  
Duncan, Brown, Weinberg & Palmer  
Suite 777  
1700 Pennsylvania Avenue, N.W.  
Washington, D. C. 20006

Dear Mr. Palmer:

I have your letter of April 4, 1975.

I am not aware that Niagara Mohawk to date  
has refused or "continues to refuse to transmit" PASNY  
hydroelectric power for the prospective account of the  
Town of Massena.

Very truly yours,



Lauman Martin  
Senior Vice President  
and General Counsel

xc: Hon. Charles Smith  
Hon. G. Laurence White  
Milton Gould, Esq.  
Robert G. Taylor  
Eugene L. Nicandri, Esq.

EXHIBIT I TO PETITION  
AND PROTEST OF MASSENA

Exhibit I

*Law Offices*  
*Duncan, Brown, Weinberg & Palmer*

SUITE 777

1700 PENNSYLVANIA AVENUE, N. W.

WASHINGTON, D. C. 20006

(202) 296-4325

TELEX 89-7445

DSWP WSH

(WUD)

WALLACE L. DUNCAN  
JON T. BROWN  
EDWARD WEINBERG  
FREDRICK D. PALMER  
FREDERICK L. MILLER, JR.  
JAY R. WEILL

CHICAGO OFFICE  
JOSEPH V. KARAGANIS  
33 NORTH LA SALLE STREET  
CHICAGO, ILLINOIS 60602

April 30, 1975

Lauman Martin, Esquire  
Senior Vice President  
and General Counsel  
Niagara Mohawk Power Corporation  
300 Erie Boulevard West  
Syracuse, New York 13202

Dear Mr. Martin:

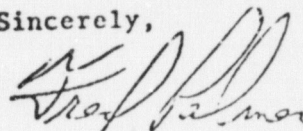
In your letter of April 10, 1975 you state:

I am not aware that Niagara Mohawk  
to date has refused or "continues  
to refuse to transmit" PASNY hydro-  
electric power for the prospective  
account of the Town of Massena.

As before, your non-responsiveness on this matter raises  
the most serious questions concerning the Company's intentions.  
We have stated that your previous statements on the issue could  
only be construed as negative. Yet you continue to posture in  
a manner designed to forestall the inevitable legal consequences  
that attach to a refusal to wheel under the anti-trust laws of  
the United States.

Since we obviously have no hope of receiving a definitive  
"yes" or "no" from you on wheeling, you leave us no recourse but  
to bring this matter to the attention of appropriate regulatory  
agencies.

Sincerely,



Fredrick D. Palmer

FDP:ld

xc: Hon. Charles Smith  
Hon. G. Laurence White  
Milton Gould, Esq.

Robert G. Taylor  
Eugene L. Nicandri, Esq.



NIAGARA MOHAWK'S ANSWER IN OPPOSITION  
TO REQUESTED INTERVENTION BY MASSENA

ONLY COPY AVAILABLE

UNITED STATES OF AMERICA  
FEDERAL POWER COMMISSION

Niagara Mohawk Power Corporation )

Docket E-9379

ANSWER IN OPPOSITION  
TO REQUESTED INTERVENTION BY TOWN OF MASSENA,  
ST. LAWRENCE COUNTY, NEW YORK

Niagara Mohawk Power Corporation ("NM") opposes granting  
of intervention to Town of Massena, St. Lawrence County, New York  
("Massena").

The names and addresses of persons to whom communications  
concerning this proceeding should be addressed are as follows:

Lauman Martin, Esq.  
Senior Vice President and General Counsel  
Niagara Mohawk Power Corporation  
300 Erie Boulevard West  
Syracuse, New York 13202

Shea Gould Climonko Kramer & Casay  
330 Madison Avenue  
New York, New York 10017  
Attention: Bernard D. Fischman, Esq.

As grounds for its opposition to the request for grant of inter-  
vention, NM respectfully represents:

(1) Massena has an inchoate municipal electric distribution  
system; it has not as yet acquired any electric distribution facilities  
for which electric transmission service from NM might be sought;

NIAGARA MOHAWK'S ANSWER IN OPPOSITION  
TO REQUESTED INTERVENTION BY MASSENA

ONLY COPY AVAILABLE

-2-

Massena admits this Commission is without jurisdictional authority to order NM to render electric transmission service to it (Intervention app., par. 7).

(2) Massena does not allege rate discrimination or that the proposed rates under consideration in the instant filing are unjust or unreasonable. In fact, Massena's prayer for relief suggests "an interim settlement to avoid injury to Consolidated Edison" (prospective recipient of NM's electric transmission service) apparently not to incur possible wrath of Consolidated Edison ("Con Ed") and its customers, if frustrated in its efforts to secure in its judgment an economically desirable segment of its power supply requirements.

Massena thus does not seriously oppose the electric transmission service by NM to Con Ed which is the subject of this docket. Unlike the Northern California Power Agency case referred to herein, Massena does not seek to engraft any modification affecting it upon the electric transmission service agreement. In essence, Massena's allegation is that revenue derived from the proposed electric transmission service "will be unlawfully used by [NM] in an effort to resist the establishment of a municipal [sic] electric system in Massena" (par. 6, item k). Why not accuse NM of using revenues from whatsoever source derived to frustrate Massena's municipal electric distribution system ambitions? The reasonable nexus required "between the activities challenged and



NIAGARA MOHAWK'S ANSWER IN OPPOSITION  
TO REQUESTED INTERVENTION BY MASSENA

-3-

the activities furthered by the application<sup>1/</sup> is here so far fetched and lacking in requirement for evidentiary hearing that the Commission should promptly deny Massena's petition accompanied by an explanation that Massena's contentions are too insubstantial to indicate the existence of substantial anticompetitive issues. What possible consequences adverse to Massena can flow from the proposed electric transmission service under consideration in this Docket?

(3) Massena's contention that NM's "latest filing is an integral part of an interstate program and combination to unlawfully monopolize the electric utility industry" (par. 6) is hardly the "reasonable nexus between the matters subject to its [regulatory commission] surveillance and those under attack on anticompetitive grounds."<sup>2/</sup> While Massena alleges an unlawful monopolization, its grounds therefor are completely spurious. The instant filing is a proposed transaction in the ordinary course of business; it is simply a successor to previously rendered services between the same parties, which services antedate Massena's vote to enter the municipal electric distribution business.

(4) As noted above (our par. 1), "The Commission simply does not possess the authority to order"<sup>3/</sup> NM to provide electric transmission service to Massena.

<sup>1/</sup> See City of Lafayette, Louisiana v. SEC, 454 F2d 941 (D.C. Cir. 1971) at 953.

<sup>2/</sup> Id., at 955.

<sup>3/</sup> See Northern California Power Agency v. F.P.C., \_\_\_\_\_ F2d \_\_\_\_\_ (D.C. Cir. No. 73-1765, March 6, 1975).

NIAGARA MOHAWK'S ANSWER IN OPPOSITION  
TO REQUESTED INTERVENTION BY MASSENA

-4-

(5) The subject matter of the instant proceeding has no relation to possible - although presently non-existent - electric transmission service to petitioner. In fact, Massena rather ludicrously asserts it was "chagrined to learn that [NM], on a regular basis, enters into transmission agreements with other investor owned utilities in the State of New York" (par. 6). As this Commission is aware, NM in the regular course of business provides transmission service not only to New York investor owned utilities, but also to out-state public and private utilities (see, for example, Dockets E-8589 et al, E-9250). NM also performs electric transmission service for Power Authority of the State of New York for delivery to municipalities and cooperatives both within and outside of the State of New York (see NM rate schedules, FPC Nos. 18, 19, 45). If there is opprobrium to be attached to rendition of electric transmission service by NM to all manner of utility operations, it is not disclosed in the manifold participations by NM under various rate schedules heretofore and presently accepted by this Commission.

(6) Massena is attempting to insert into this Docket E-9379 completely unrelated alleged anti-trust violations (incipient at most favorable reading to Massena). The Commission decision on the instant filing can have no relation to Massena's anti-trust complaint.

(7) Massena's charges about NM's use of anticipated revenues from its instant filing which "will allegedly strengthen Niagara Mohawk



ONLY COPY AVAILABLE

44a

NIAGARA MOHAWK'S ANSWER IN OPPOSITION  
TO REQUESTED INTERVENTION BY MASSENA

-5-

in the pursuit of an anticompetitive scheme to the detriment of Massena" (par. 10) border on the scurrilous. NM reports annually to this Commission in the complete detail required on Form P-1, for example, and this Commission has full power to investigate the disposition of any electric revenues NM receives. NM also reports fully to the Public Service Commission of the State of New York, which has plenary jurisdiction over its electric operations. Detailed denial of Massena's allegations re anticompetitive charges is both unnecessary and unwarranted.

(8) If, on the present status of its incipient municipal electric distribution system activities, Massena has valid charges to make against NM, the courts are the appropriate place head-on to deal with Massena's complaint.<sup>4/</sup>

(9) Massena seeks only a forum within which to secure publicity for its anti-trust charges against NM, having admitted this Commission is without jurisdiction to act to provide electric transmission service to Massena should it actually have an electric distribution

<sup>4/</sup> In Northern California Power Agency v. F.P.C., \_\_\_\_\_ P2d \_\_\_\_\_ (D.C. Cir. No. 73-1765, March 6, 1975), the Court noted significantly in a footnote attached to the last sentence of a unanimous opinion: "Without intimating any view of the possible merits, vel non, of Northern California Power Agency's allegations against Pacific Gas & Electric, we think it appropriate to suggest that existing anti-trust laws may well be the most beneficial means of airing Northern California Power Agency's grievances. See, e.g., Otter Tail Power Co. v. United States, 410 U.S. 366 (1973)."

ONLY COPY AVAILABLE

NIAGARA MOHAWK'S ANSWER IN OPPOSITION  
TO REQUESTED INTERVENTION BY MASSENA

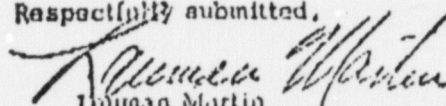
- 6 -

system to operate. This Commission does not have an obligation to lend its mechanism to matters unrelated to the discharge of its statutory duties.

(10) NM repeats that the instant proceeding bears no relation to the interest of Massena in establishing a municipal electric distribution system. NM, in fact, has advised Massena that "If at some future time Niagara Mohawk is to be obligated to supply transmission service to a Town of Massena electric distribution system, Niagara Mohawk's charges for such service" must be fixed within the parameters approved by regulatory agencies (par. 5). Should that service factually become necessary, Massena is assured of fair treatment. Actually, the electric transmission service under consideration in Docket E-9379 will undoubtedly have terminated prior to the activation of a Massena electric distribution system.

WHEREFORE, NM respectfully requests the Commission deny in all respects Massena's petition to intervene and that it permit the effective filing of the electric transmission service agreement pending in this Docket E-9379.

Respectfully submitted,

  
Raymond Martin  
Senior Vice President  
and General Counsel

for Niagara Mohawk Power Corporation  
300 Erie Boulevard West  
Syracuse, New York 13202



NIAGARA MOHAWK'S ANSWER IN OPPOSITION  
TO REQUESTED INTERVENTION BY MASSENA

ONLY COPY AVAILABLE

STATE OF NEW YORK     )  
                              ) ss.:  
COUNTY OF ONONDAGA    )

LAUMAN MARTIN, being duly sworn, deposes and says that  
he has read the foregoing petition and knows the contents thereof;  
that the same is true to his own knowledge except as to matters  
therein stated to be on information and belief, and as to those matters  
he believes it to be true; that the reason this verification is made by  
deponent and not by Niagara Mohawk Power Corporation is that Niagara  
Mohawk Power Corporation is a domestic corporation whereof deponent  
is an officer, to wit: its Senior Vice President and General Counsel.

*Lauman Martin*

Subscribed and sworn to  
before me this 16th day  
of May, 1975.

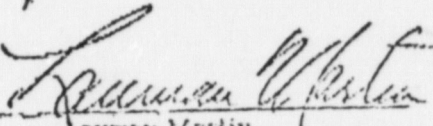
*Carolyn F. Robertson*  
Notary Public

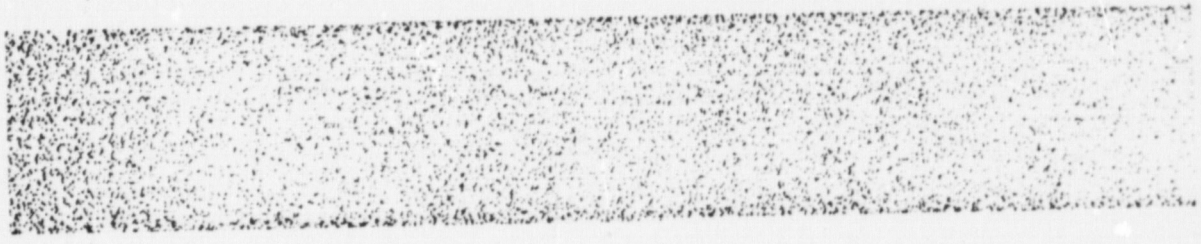
CAROLYN F. ROBERTSON  
Notary Public in the State of New York  
Qualified in Onondaga Co. No. 13 6592125  
My Commission Expires March 30, 1976

NIAGARA MOHAWK'S ANSWER IN OPPOSITION  
TO REQUESTED INTERVENTION BY MASSENA

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing  
Answer upon all parties of record by depositing copies thereof in the  
United States mail, postage prepaid, this 16th day of May, 1975.

  
Lauman Martin





ONLY COPY AVAILABLE

48a

NIAGARA MOHAWK'S ANSWER IN OPPOSITION  
TO REQUESTED INTERVENTION BY MASSENA

SERVICE LIST

Niagara Mohawk Power Corporation - PFC Docket No. E-9379

Hon. Kenneth F. Plumb, Secretary  
Federal Power Commission  
825 North Capitol Street, N.E.  
Washington, D.C. 20426

Shea Gould Cilmenko Kramer & Casey  
330 Madison Avenue  
New York, New York 10017  
Attention: Bernard D. Fischman, Esq.

Fredrick D. Palmer, Esq.  
Wallace L. Duncan, Esq.  
Duncan, Brown, Weinberg & Palmer  
Suite 777  
1700 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006

Mr. Charles Smith  
Town Supervisor  
Town Hall  
Massena, New York 13662

Eugene L. Nicandri, Esq.  
Lavigne & Nicandri  
57 East Orvis Street  
Massena, New York 13662

Bertram Moll, Esq.  
Vice President  
Consolidated Edison Company of New York, Inc.  
4 Irving Place  
New York, New York 10003

Mr. John L. Kennedy  
Vice President  
Rochester Gas and Electric Corporation  
89 East Avenue  
Rochester, New York 14649

## AMENDED ANSWER OF CONSOLIDATED EDISON

ONLY COPY AVAILABLE

UNITED STATES OF AMERICA  
FEDERAL POWER COMMISSION

NIAGARA MOHAWK POWER CORPORATION

Docket E-9379

AMENDED ANSWER OF CONSOLIDATED EDISON  
COMPANY OF NEW YORK, INC. TO THE PROTEST,  
PETITION TO INTERVENE, AND MOTION OF  
THE TOWN OF MASSENA

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. ("Con Edison") by its attorney Donal F. McCarthy, in answer to the Protest, Petition, and Motion of the Town of Massena ("Massena"), respectfully shows:

1. The Petition is not addressed to the merits of the contract for the wheeling of power to Con Edison (the "Rate Schedule") filed herein by NIAGARA MOHAWK POWER CORPORATION ("Niagara"). Rather, the essence of the Petition is the statement that "...Niagara Mohawk's latest filing is an integral part of an interstate program and combination to unlawfully monopolize the electric utility industry." (Petition, ¶6)

2. Although it is readily evident that the allegations and exhibits of the Petition are not adequate to support the



## AMENDED ANSWER OF CONSOLIDATED EDISON

-2-

broad contention quoted above, the Commission's obligation to dismiss the Petition rests upon more basic legal grounds than a mere study of these inadequacies. The Petition must be dismissed because, as a legal matter, it constitutes an attempt to litigate questions that are not relevant to the issue presented to the FPC by the filing of the Rate Schedule.

3. Sections 205 and 206 of the Federal Power Act (16 USCA §§ 824d, 824e) require the Commission to determine whether rates are just and reasonable and not unduly preferential or discriminatory. Although other sections of the Act give the Commission jurisdiction over other aspects of the business of electric utility companies, the dimension of the Commission's inquiry into a rate must be limited to its justness, reasonableness and freedom from undue preference and discrimination. Massena's allegations do not even remotely bear on the statutory tests for the acceptability of a rate.

4. The capacity and associated energy contracted to be transmitted by Niagara is an economical purchase which serves to reduce Con Edison customer costs, since these rates are directly reflected in the Company's fuel adjustment clause. Moreover, the purchase enhances service reliability. The corporate interest of Con Edison is unaffected. Should the

## AMENDED ANSWER OF CONSOLIDATED EDISON

-3-

Commission fail to accept Niagara Mohawk's filing on the basis of the extraneous issues raised by Massena, Con Edison's customers' costs will be increased pending inquiry into issues unrelated to this proceeding. Moreover, the relief requested by Massena is not in any way necessary for the resolution of the issues presented by it.

5. The power transmitted under the Rate Schedule originates on the system of Rochester Gas and Electric Corporation, which has a mix of coal-fired and nuclear generation in contrast with Con Edison's largely oil-fired system. In thus reducing dependence upon imported residual oil, the purchase is in the national interest.

6. The issues raised by Massena, even if appropriate for FPC consideration, would more properly be the subject of a separate proceeding and should not be introduced into this proceeding to confuse the proper inquiry of the Commission into the justness and reasonableness of the Rate Schedule.

WHEREFORE, it is respectfully requested that the Commission issue an order denying Massena's Motion for



## AMENDED ANSWER OF CONSOLIDATED EDISON

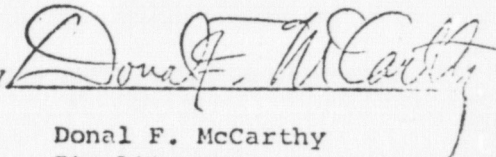
-4-

rejection or suspension and dismissing Massena's Petition  
to Intervene.

Dated: New York, New York  
May 16, 1975

CONSOLIDATED EDISON COMPANY  
OF NEW YORK, INC.

By



Donal F. McCarthy  
Its Attorney  
4 Irving Place  
New York, New York 10003

(212) 460-6541

## AMENDED ANSWER OF CONSOLIDATED EDISON

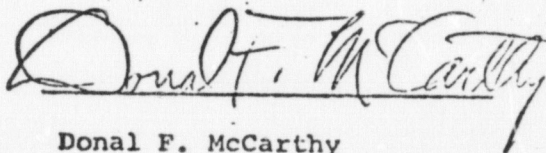
VERIFICATION

STATE OF NEW YORK

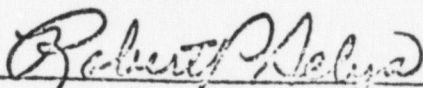
COUNTY OF NEW YORK

SS.:

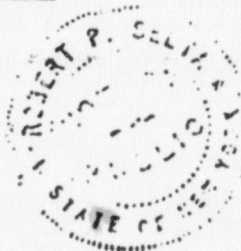
DONAL F. MCCARTHY, being duly sworn, deposes and says: That he is the attorney for CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and that he is authorized to execute and file the foregoing Amended Answer; that he has read said Amended Answer and is familiar with the contents thereof; and that all statements of fact therein set forth are true and correct, to the best of his knowledge, information and belief.

  
Donal F. McCarthy

Subscribed and sworn to  
before me this 16th day  
of May, 1975.



ROBERT P. SELIGMAN  
Notary Public, State of New York  
No. 69176-15  
Qualified in New York County  
Commission Expires March 30, 1976





FEDERAL POWER COMMISSION ORDER ISSUED JUNE 2, 1975

UNITED STATES OF AMERICA  
FEDERAL POWER COMMISSION



Before Commissioners: John N. Nassikas, Chairman;  
William L. Springer, and Don S. Smith.

Niagara Mohawk Power Corporation ) Docket No. E-9379

ORDER ACCEPTING FOR FILING AND APPROVING  
PROPOSED RATE SCHEDULE, GRANTING PETITION  
TO INTERVENE, AND DENYING MOTION OF TOWN OF MASSENA

(Issued June 2, 1975)

On April 14, 1975, Niagara Mohawk Power Corporation (Niagara) submitted for filing as a rate schedule a transmission agreement dated March 7, 1975, between Niagara Mohawk Power Corporation and Consolidated Edison Company of New York, Inc. The service to be rendered by Niagara provides for the transmission of power and energy between Niagara's transmission connection with Rochester Gas and Electric Corporation (Rochester) and Niagara's transmission connection with Consolidated Edison Company of New York, Inc. (Edison) Pleasant Valley 345 Kv Substation.

Edison agrees to pay Niagara at the rate of \$38.00 per megawatt per day of contract demand then in effect, not to exceed 150 megawatts per day. The estimated additional revenues total \$1,668,219 from October 27, 1974, the proposed effective date through October 31, 1975, the period covered by the Agreement. Niagara requests the Commission waive its regulation with respect to prior notice and that October 27, 1974, be designated the effective date of the Agreement.

Niagara's April 14, 1975, filing was noticed on April 18, 1975, with any protests, comments, or petitions to intervene due on or before May 5, 1975. The Town of Massena, New York, filed May 5, 1975 a Protest and Petition to intervene, a Motion to reject the rate schedule filing, or, in the alternative, to suspend the operation of the rate schedule for five months and to order a hearing.

Massena, New York, a municipality whose residents are currently served electric power by Niagara Mohawk at retail, desires to acquire the electrical distribution facilities

- 2 -

Docket No. E-9379

of Niagara to establish a municipally owned and operated electric system. Massena alleges that Niagara Mohawk, in the face of Massena's expressed desire to negotiate a transmission agreement, refuses to enter into meaningful discussion leading to contractual arrangements. As a result, Massena contends Niagara has refused to wheel energy to it; while the Agreement, the subject of this docket, "is an integral part of an interstate program and combination to monopolize the electric utility industry". (p. 8) Specifically, Massena states that the revenues generated, if this filing is accepted and approved, "will be unlawfully used by the Company to strengthen its monopolistic position over transmission in the Massena service area" and in the furtherance thereof, ". . . to resist the establishment of a municipal electric system in Massena. . ." (p. 10) Massena concedes the Commission does not have the authority to compel Niagara to enter into a contractual transmission system with Massena, but does request the Commission permit Massena to intervene in the proceeding, reject the April 14, 1975, filing of Niagara, or, in the alternative, withhold its acceptance pending hearing, or suspend operation of the filing for five months and order a hearing, and order a conference of the parties to negotiate an agreement for the protection of Consolidated Edison.

Consolidated Edison, on May 19, 1975, filed in this docket, an amended answer to the protest petition to intervene and motion of the Town of Massena. Con Ed contends therein that Massena has not addressed itself to the merits of the transmission contract between Niagara and Con Ed, but rather, is concerned with anticompetitive allegations against Niagara which are irrelevant to the issue presented to the Commission in the filing of the rate schedule. Specifically, the proper issue for the Commission's consideration is whether the rate proposed herein is just and reasonable, as well as free from undue preference and discrimination.

Similarly, Niagara Mohawk filed an answer in opposition to the requested intervention by the Town of Massena on May 19, 1975. According to Niagara, Massena does not seriously object to the electric transmission service by Niagara to Con Ed and, in fact, cannot possibly suffer adverse consequences from the proposed service. Moreover,



Docket No. E-9379

Niagara maintains Massena's petition should be denied for failing to provide substantive grounds to support its anticompetitive allegations. Ultimately, the filing under consideration is unrelated to those allegations, it adds.

The Commission's review of Niagara Mohawk's filing indicates that the proposed rate schedule is just and reasonable and is indeed free of undue preference and discrimination and shall therefore be accepted for filing and approved. The requested waiver of the Commission regulation requiring prior notice will be granted, thus permitting an effective date of October 27, 1974.

Although we find that granting Massena's petition to intervene by Massena may be in the public interest, we find that the Motion for rejection or suspension should be denied. After careful review, we believe the latter does not address the issue presented for consideration under this filing, that is, whether the proposed rate schedule for the Niagara transmission service between Rochester and Con Ed provides for just and reasonable rates consistent with the public interest. Massena's argument is basically that Niagara is acting in an anticompetitive manner because it refuses to agree to wheel PASNY power to Massena in the event that Massena establishes a municipal electric distribution system. Massena argues that it is therefore appropriate to reject or suspend and set for hearing Niagara's rate schedule for service to Consolidated Edison since approval of the instant rate schedule "will financially strengthen Niagara" in its alleged efforts to "resist the establishment of a municipal electric system in Massena through advertising, legislative efforts in New York, and in its dealings with PASNY."

Our review of Massena's pleadings, and the responses thereto, indicates that a reasonable and sufficient nexus has not been established by Massena between the alleged monopolistic, anticompetitive practices and designs of Niagara and the proposed electric transmission service agreement herein filed with the Commission. Moreover, without demonstrating substantial anticompetitive practices, Massena has failed to indicate what possible harm it will experience as the result of the instant rate schedule filing. As conceded by Massena, the Commission is not authorized to compel Niagara to enter into an agreement

Docket No. E-9379

to provide electric transmission service to Massena.<sup>2/</sup> Massena's desire to establish a municipally owned and operated electric distribution system is unrelated to the immediate issue raised in this filing.

The Commission finds:

(1) Good cause exists for the Commission to accept for filing Niagara's April 14, 1975, proposed rate schedule and to permit it to become effective October 27, 1974, waiving the prior notice requirement of the Commission's Regulations.

(2) Good cause exists to grant Town of Massena, New York's May 5, 1975, petition to intervene and to deny its motion to reject or suspend the operation of the rate schedule.

The Commission orders:

(A) Pursuant to the authority of the Federal Power Act, particularly Section 205 thereof, the Commission's Rules of Practice and Procedure, and the Regulations under the Federal Power Act, the Commission hereby accepts for filing Niagara Mohawk's April 14, 1975, proposed rate schedule and permits it to become effective October 27, 1974, waiving the prior notice requirements of the Commission's Regulations.

(B) The Commission hereby grants the Town of Massena's May 5, 1975, petition to intervene in these proceedings subject to the rules and regulations of the Commission; Provided, however, that participation of such intervenor shall be limited to matters affecting asserted rights and interests as specifically set forth in the petition to intervene; and Provided, further, that the admission of such intervenor shall not be construed as recognition by the Commission that they might be aggrieved because of any order or orders of the Commission entered in this proceeding.

2/ Otter Tail, supra.



58a

FEDERAL POWER COMMISSION ORDER ISSUED JUNE 2, 1975

- 5 -

Docket No. E-9379

(C) Massena's motion to reject or suspend Niagara's filing is denied.

(D) The Secretary shall cause prompt publication of this order to be made in the Federal Register.

By the Commission

( S E A L )

Kenneth F. Plumb,  
Secretary.

## TOWN OF MASSENA APPLICATION FOR REHEARING

UNITED STATES OF AMERICA  
FEDERAL POWER COMMISSION

Niagara Mohawk Power Corp.

)

Docket No. E-9379

TOWN OF MASSENA APPLICATION  
FOR REHEARING AND/OR CLARIFICATION  
OF DECISION AND ORDER OF THE  
FEDERAL POWER COMMISSION

COMES NOW the Town of Massena, New York (Massena), by and through counsel Fredrick D. Palmer and Jay R. Weill, Duncan, Brown, Weinberg & Palmer, and files this Application for Rehearing and/or Clarification of the Decision and Order of the Commission dated and issued on June 2, 1975, in the above-captioned proceedings.

1. This Application for Rehearing and/or Clarification is filed pursuant to Sections 1.34(a) et seq. of the Commission's Rules of Practice and Procedure.

2. Massena incorporates by reference herein the allegations contained in its Protest and Petition to Intervene, Motion to Reject Rate Schedule Filing, or, in the Alternative to Suspend the Operation of the Rate Schedule for Five Months and to Order a Hearing, and for other appropriate relief filed with the Commission on May 5, 1975.

3. In summary, Massena alleged in its Protest, Petition and Motion, that Niagara Mohawk's rate filing was part of an interstate program and combination to unlawfully monopolize the electric utility industry. As such, the revenues Niagara Mohawk



## TOWN OF MASSENA APPLICATION FOR REHEARING

- 2 -

will receive if the Commission accepts and approves this filing will be unlawfully used by the Company to strengthen its monopolistic position over transmission in the Massena service area to the detriment of Massena. Accordingly, Massena asked the Commission to reject the filing or in the alternative to suspend the operation of the filing for five months and order a hearing on the issues Massena raised in its Protest, Petition and Motion.

4. The Commission in its Order of June 2, 1975 denied Massena's Motion to Reject or Suspend Niagara's rate filing, yet granted Massena's Petition to Intervene. Although the Commission found it was in the public interest to grant Massena intervention, it also accepted for filing Niagara Mohawk's April 14, 1975, proposed transmission agreement and permitted it to become effective October 27, 1974, thereby waiving the prior notice requirements of the Commission's Regulations.

5. The Commission based its Order on a finding that "...a reasonable and sufficient nexus has not been established by Massena between the alleged monopolistic, anticompetitive practices and designs of Niagara and the proposed electric transmission service agreement..." and on a finding that Massena has not established "...substantial anticompetitive practices..." thus failing "...to indicate what possible harm it will experience..." (Order at 3).

61a  
TOWN OF MASSENA APPLICATION FOR REHEARING

- 3 -

6. Massena does not believe the Commission holds that it is incumbent upon a complainant to establish, prior to hearing, facts complained of upon which relief may be granted. To so hold would be an abuse of discretion. As stated in Municipal Light Boards v. Federal Power Commission, 450 F.2d 1341 (D.C. Cir., 1971):

The general thrust of the Administrative Procedure Act is the requirement of a proceeding for the presentation of conflicting contentions for resolution by the agency. There are occasions when an agency may dispose of a controversy on the pleadings without an evidentiary hearing when the opposing presentations reveal that no dispute of fact is involved, but, only a question of law or administrative policy of such a nature that there is neither a dispute as to material facts nor a need to ventilate the underlying facts to aid in policy determination. Id. at 1345 (footnote omitted).

Thus the Commission's action here can only be justified on the basis that the specific allegations of Massena, as a matter of law, do not give rise to any relief (if established) under the Federal Power Act. Massena believes that such a conclusion would be at odds with the import of Northern California Power Agency v. Federal Power Commission, \_\_\_\_ F.2d \_\_\_\_ (D.C. Cir., No. 73-1765, March 6, 1975). Niagara Mohawk has not denied Massena's allegation that it has refused to agree in principle to wheel PASNY power to Massena upon establishment of a municipal utility. Niagara Mohawk has also admitted that, as a matter of course, it enters into transmission agreements with investor owned and consumer owned utilities and with governmental agencies. Under



## TOWN OF MASSENA APPLICATION FOR REHEARING

- 4 -

these circumstances, Massena must inquire of this Commission whether it feels it lacks the authority to rectify what appears to be discrimination by Niagara Mohawk in execution of transmission agreements, all or most of which are subject to the jurisdiction of this Commission. The Commission was not clear on this point in its Order and Massena respectfully requests clarification.

7. The Commission, by allowing Massena to intervene while, simultaneously, accepting the transmission agreement for filing and allowing it to become effective, seems to have allowed intervention into nothing. This might more appropriately be styled the "revolving door" theory of regulatory jurisdiction. There are two possible constructions of the Commission's action. First, the Commission possibly intends that the matter is closed, even though Massena was allowed to intervene for an instant into a proceeding that was effectively terminated. Second, the Commission possibly intends an investigation into Niagara Mohawk's contracting practices with investor owned and consumer owned utilities and with governmental agencies, similar to that undertaken in Pacific Gas & Electric Company, Docket No. E-7777 (now pending). To the extent that the intent of the Commission's action is unclear, Massena asks for clarification of the Commission Order.

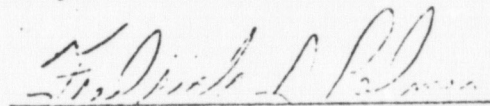
## TOWN OF MASSENA APPLICATION FOR REHEARING

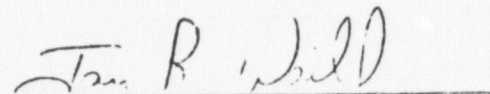
- 5 -

8. Assuming that the first possibility is what the Commission intended (i.e., the matter is at an end), Massena respectfully requests rehearing of the previous Order based on the premise that Massena continues to believe that this Commission has on-going jurisdiction and a role to play where complaints of discriminatory treatment are lodged against regulated utilities' practices in connection with transmission agreements that are clearly subject to this Commission's jurisdiction under Sections 205 and 206 of the Federal Power Act.

WHEREFORE, Massena submits this Application for Rehearing and Clarification and respectfully moves this Commission to clarify its Order of June 2, 1975, and state what further jurisdiction the Commission has over this proceeding to which Massena could exercise its position as an intervenor.

Respectfully submitted,

  
Fredrick D. Palmer

  
Jay R. Weill

DUNCAN, BROWN, WEINBERG & PALMER  
1700 Pennsylvania Avenue, N. W.  
Suite 777  
Washington, D. C. 20006

(202) 296-4325

Attorneys for the Town of Massena

Dated: 6/19/75



~~VERIFICATION~~

City of Washington :  
District of Columbia :

FREDRICK D. PALMER, being first duly sworn, deposes and says that he is the attorney for the Town of Massena, New York, and that he is authorized to execute and file the foregoing Application for Rehearing and Clarification; that he has read said petition and is familiar with the contents thereof; and that all statements of fact therein set forth are true and correct, to the best of his knowledge, information and belief.

*Fredrick D. Palmer*  
Fredrick D. Palmer

Subscribed and sworn to before me  
this 10 day of June, 1975.

Robert L. Brown  
NOTARY PUBLIC

My Commission expires My Commission Expires August 14, 1979

## TOWN OF MASSENA APPLICATION FOR REHEARING

## CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Application for Rehearing and Clarification upon all parties of record by depositing copies thereof in the United States mail, postage prepaid, this 10th day of June, 1975.

Fredrick D. Palmer  
Fredrick D. Palmer

Dated: 6/19/75



FEDERAL POWER COMMISSION ORDER  
ISSUED JULY 23, 1975

UNITED STATES OF AMERICA  
FEDERAL POWER COMMISSION



Before Commissioners: John N. Nassikas, Chairman;  
William L. Springer and Don S. Smith.

Niagara Mohawk Power Corporation ) Docket No. E-9379

ORDER GRANTING REHEARING AND CLARIFYING PRIOR ORDER

(Issued July 23, 1975)

On June 23, 1975, the Town of Massena, New York (Massena) pursuant to Section 1.34 of our Regulations, applied for rehearing and/or clarification of an order issued June 2, 1975, in the above-captioned proceedings. In that order we accepted for filing Niagara Mohawk Power Corporation's (Niagara) April 14, 1975, proposed transmission agreement and permitted it to become effective October 27, 1974, thereby waiving the prior notice requirement, denied Massena's motion to reject or suspend Niagara's rate filing and granted Massena's petition to intervene. Massena is requesting rehearing of the order issued June 2, 1975, based on their belief that the Commission retains jurisdiction where complaints of discriminatory treatment are lodged against a regulated utilities' practices in connection with transmission agreements and further clarification of that order vis-a-vis Massena's position as intervenor.

Docket No. E-9379

Massena's May 5, 1975, protest, petition, and motion, incorporated by reference in their application, contended that Niagara's rate filing was part of an interstate program and combination to unlawfully monopolize the electric utility industry. That contention is premised on Niagara's alleged refusal to enter into negotiations leading to a contract by which Niagara would wheel energy to Massena, thereby enabling Massena to establish a municipally owned and operated electric system. Massena concludes that the revenues Niagara would receive from the filing in the above-referenced docket would be unlawfully used by the Company to strengthen its alleged monopolistic position over transmission in the Massena service area to the detriment of Massena.

The basis upon which the Commission denied Massena's motion to reject or suspend the Niagara rate filing was a finding that "... a reasonable and sufficient nexus has not been established by Massena between the alleged monopolistic, anticompetitive practices and designs of Niagara and the proposed electric transmission service agreement ..." and on a finding that Massena has not established "... substantial anticompetitive practices ..." thus failing "... to indicate what possible harm it will experience as the result of the instant rate schedule filing" (Order at 3).

Massena maintains that they have suffered discrimination at the hands of Niagara in the latter's failure to execute voluntarily a transmission agreement with Massena. Niagara has not denied Massena's allegation that it refused to agree in principle to wheel power to Massena upon their establishing a municipal utility. Niagara does in fact enter into transmission agreements with investor owned and consumer owned utilities and with governmental agencies.



FEDERAL POWER COMMISSION ORDER ISSUED JULY 23, 1975

Docket No. E-9379

-3-

In view of the allegation raised by the intervenor Massena herein, that Niagara's rate filing is part of an interstate program to unlawfully monopolize the electric utility industry and discriminate against the establishment by Massena of a municipal energy system, we find it is proper and appropriate in the public interest that the Application for Rehearing should be granted and an investigation pursuant to Section 206 of the Federal Power Act be instituted.

The Commission finds:

The Application for Rehearing should be granted, and an investigation under Section 206 of the Federal Power Act should be instituted.

The Commission orders:

(A) Pursuant to the authority of the Federal Power Act, particularly Section 206 thereof, the Commission's Rules of Practice and Procedure, and the Regulations under the Federal Power Act, a public hearing shall be held on December 16, 1975 at 10:00 A.M., in a hearing room of the Federal Power Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426.

(B) On or before October 21, 1975 Niagara shall serve its direct testimony. On or before November 4, 1975, the Commission Staff shall serve its prepared testimony and exhibits. Any intervenor evidence will be filed on or before November 18, 1975. Any company rebuttal evidence shall be served on or before December 2, 1975.

(C) A Presiding Administrative Law Judge to be designated by the Chief Administrative Law Judge for that purpose, (See Delegation of Authority, 18 CFR 3.5(d)), shall preside at the hearing in this proceeding, shall prescribe relevant procedural matters not herein provided, and shall control this proceeding in accordance with the policies expressed in Section 2.59 of the Commission's Rules of Practice and Procedure.

FEDERAL POWER COMMISSION ORDER ISSUED JULY 23, 1975

Docket No. E-9379

-4-

(D) The Secretary shall cause prompt publication of this order to be made in the Federal Register.

By the Commission.

( S E A L )

Kenneth F. Plumb,  
Secretary.



MOTION TO DISMISS INVESTIGATION

---

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL POWER COMMISSION

Niagara Mohawk Power Corporation )

Docket No. E-9379

MOTION TO DISMISS  
INVESTIGATION DIRECTED  
PURSUANT TO ORDER ISSUED  
JULY 23, 1975, GRANTING REHEARING, ETC.

LAUMAN MARTIN  
Senior Vice President and  
General Counsel  
Niagara Mohawk Power Corporation  
300 Erie Boulevard West  
Syracuse, New York 13202

SHEA GOULD CLIMENKO KRAMER & CASEY  
330 Madison Avenue  
New York, New York 10017  
Bernard D. Fischman, Esq.  
of Counsel

August 12, 1975

## MOTION TO DISMISS INVESTIGATION

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL POWER COMMISSION

Niagara Mohawk Power Corporation

)

Docket No. E-9379

MOTION TO DISMISS  
INVESTIGATION DIRECTED  
PURSUANT TO ORDER ISSUED  
JULY 23, 1975, GRANTING REHEARING, ETC.

Niagara Mohawk Power Corporation ("Niagara") hereby moves that the Commission forthwith dismiss the investigation instituted pursuant to the Order issued July 23, 1975 in this docket upon the complaint of the Town of Massena ("Massena").

The nub of Massena's alleged case against Niagara is the following:

[Massena's] "Complaints of discriminatory treatment are lodged against a regulated utilities' practices in connection with transmission agreements ..."

[Massena] "contended that Niagara's rate filing was part of an interstate program and combination to unlawfully monopolize the electric utility industry."

"Massena concludes that the revenues Niagara would receive ... would be unlawfully used ... to strengthen its alleged monopolistic position over transmission in the Massena service area to the detriment of Massena."

"Massena [alleges] ... discrimination at the hands of Niagara in the latter's failure to execute voluntarily a transmission agreement with Massena."



## MOTION TO DISMISS INVESTIGATION

-2-

"Niagara has not denied Massena's allegation that it refused in principle to wheel power to Massena upon their establishing a municipal utility." (Emphasis supplied)

Preliminary Statement

Niagara is a "public utility" as defined in the Act and recognizes the jurisdiction of the Commission over it to the extent that such jurisdiction can rationally stem from within the four corners of that Act.

As the Order notes,

"Niagara does in fact enter into transmission agreements with investor-owned and consumer-owned utilities and with government agencies."

Since one of Massena's charges (unsupported, we submit) is that Niagara refuses "in principle" to wheel power to Massena's non-existent municipal electric distribution system, Niagara is entitled to evidence its performance to date with respect to electric transmission service to others.

Moreover, Massena's scatter-shot charges of discriminatory treatment by reason of "a regulated utilities' [Niagara] practices in connection with transmission agreements" and that the Docket E-9379 rate filing "was part of an interstate program and combination to unlawfully monopolize the electric utility industry" are completely unsupported and hardly deserve mention. However, in the light of these charges it is to be noted, first, that the filing in Docket E-9379 actually relates only to an intrastate service, i.e., Rochester to New York City over Niagara lines entirely within the State of New York. Second, perhaps some recital of Niagara's transmission service activities will dispel any notion that Niagara indulges in unlawful

## MOTION TO DISMISS INVESTIGATION

-3-

More specifically, as respects municipal utility systems within or adjacent to its franchise territory, Niagara transmits power from projects of the Power Authority of the State of New York <sup>1/</sup> ("PASNY") to every municipality relying on PASNY power, namely:

City of Salamanca,	Cattaraugus County
Village of Andover,	Allegheny "
" Akron,	Erie "
" Wellsville,	Allegheny "
" Fairport,	Monroe "
" Little Valley,	Cattaraugus "
" Arcade,	Wyoming "
" Springville,	Erie "
" Bergen,	Genesee "
" Westfield,	Chautauqua "
" Mayville,	Chautauqua "
" Churchville,	Monroe "
City of Jamestown,	Chautauqua "
City of Plattsburgh,	Clinton "
Village of Boonville,	Oneida "
" Solvay	Onondaga "
" Theresa,	Jefferson "
" Philadelphia,	Jefferson "
" Ilion,	Herkimer "
" Mohawk,	Herkimer "
" Skaneateles,	Onondaga "
" Frankfort,	Herkimer "
Lake Placid Village, Inc.	Essex "
Village of Tupper Lake,	Franklin "

Additionally, Niagara serves as a transmission link with New York State Electric & Gas Corporation ("NYSEG") in the delivery of PASNY power to the following, each being located in NYSEG franchise territory:

<sup>1/</sup> See Niagara FPC rate schedules 18, 19.



## MOTION TO DISMISS INVESTIGATION

-4-

Allegheny Electric Cooperative, Inc.	Allegheny County (and Pennsy)
Village of Hamilton	Madison County
" Sherburne	Chenango "
Delaware County Electric	
Cooperative, Inc.	Delaware "
Oneida-Madison Electric Cooperative,	
Inc.	Oneida & Madison Counties
Otsego Electric Cooperative, Inc.	Otsego County

Niagara Mohawk has no present direct service to any cooperatives since none are within direct reach of Niagara)<sup>2/</sup>. As authorized in the instant docket, Niagara provides transmission service to many of the utilities and public agencies such as those covered by Niagara FPC rate schedules as set forth in Appendix A.

It cannot be said that Niagara has failed to date to participate fully in rendering transmission service where use of Niagara lines for that purpose is the economic way to operate.

Niagara concedes "that the Federal Power Commission ... must consider the anti-competitive consequences of matters properly before it."<sup>3/</sup>

In this proceeding, however Massena has not questioned any of the terms for Niagara transmission service as permitted pursuant to permission granted June 2, 1975. Nor has Massena even intimated that the service will affect its inchoate interests. Massena's intervention here (it being the only then current Niagara matter before the Commission which

<sup>2/</sup> Niagara is presently negotiating with Oneida-Madison Cooperative to provide a delivery point for PASNY power over Niagara lines, additional to present delivery from NYSEG.

<sup>3/</sup> Northern California Public Agency v. FPC, 514 F2d 184, 187 (1975)

## MOTION TO DISMISS INVESTIGATION

-5-

Massena could latch onto) is solely to assert its concern about a completely unrelated matter - namely, whether or not, in the event Massena can eventually acquire a municipal electric distribution system, will Niagara provide it transmission service for the PASNY power Massena expects to contract for.

In its Order issued July 2, 1975, the Commission found in full answer to Massena's plea and after consideration of Massena's formal protest, petition and motion of May 5, 1975, that

"[A] reasonable and sufficient nexus has not been established by Massena between the alleged monopolistic, anticompetitive practices and designs of Niagara and the proposed electric transmission service agreement."

and that Massena has not established

"substantial anticompetitive practices" [by Niagara]

and that Massena failed to show

"what possible harm it will experience as the result of the instant rate schedule filing."

Niagara submits that Massena's anti-competitive practice complaint as to the filing at issue was properly disposed of without hearing and that the above-quoted explanation of the Commission's action indicated that Massena's contentions were too insubstantial or barren to warrant further consideration <sup>4/</sup> in Docket E-9379.

<sup>4/</sup> City of Lafayette, Louisiana v. FPC, 454 F 2d 941, 953 (1971).



## MOTION TO DISMISS INVESTIGATION

-6-

There is no indication whatsoever that consequences deleterious to Massena will result from the transmission service (terminating October 31, 1975) permitted by Order in Docket E-9379. The Niagara transmission facilities for which short term transmission service from Rochester Gas & Electric Corporation to Consolidated Edison Company of New York, Inc. is provided are not by any means physically near or within Niagara's Massena service area.

The Massena charge "that the revenues Niagara would receive from the filing in the above-referenced docket would be unlawfully used by the Company to strengthen its alleged monopolistic position over transmission in the Massena service area to the detriment of Massena" would be laughable were it not so outrageous. As this Commission knows, and as does the Public Service Commission of the State of New York to which Niagara also reports, all revenues of Niagara from whatsoever source derived are identified by source and thereupon applied generally to the financial requirements of Niagara for its operations. Revenues from FPC-permitted charges are not isolated per se. Each Commission will surely spot any use for unlawful purposes by Niagara of any revenues including those receivable from the transmission service permitted pursuant to the Order issued June 2, 1975 in Docket E-9379. If Massena asserts revenues from this particular transmission service will be "unlawfully used", the same complaint applies to any dollar of revenues Niagara may receive from the

## MOTION TO DISMISS INVESTIGATION

-7-

conduct of its business. Should Niagara suspend all operations - and receipt of revenues therefrom - because Massena blatantly asserts (without <sup>5/</sup> substance or support) that Niagara is guilty of unlawful use of its revenues?

A basic reason (already noted), direct and primary, in support of the Commission's original denial of Massena's application for hearing, issued June 2, 1975, is that the transmission service agreement permitted to become effective pursuant to that Order will in fact terminate October 31, 1975, and accordingly will not affect Massena's prospective municipal utility distribution system operations, whenever those operations are <sup>6/</sup> commenced, if ever.

<sup>5/</sup> Niagara has faithfully reported its expenditures in resisting the Massena takeover as a "below the line" expense. See p. 305, FPC Form 1 Report for 1974.

<sup>6/</sup> Massena has considerable hurdles to overcome before entering the municipal electric distribution system business. It has terminated any effort to reach agreement with Niagara on takeover price. It has commenced an action in the County Court, St. Lawrence County to condemn certain electric facilities of Niagara, apparently both within and without the Town of Massena (Town of Massena v. Niagara Mohawk Power Corporation, Index 59243). The County Court has deferred receipt of pleadings by Niagara pending receipt from the Public Service Commission of the State of New York of a certificate pursuant to Section 5-a of the Condemnation Law (N.Y. Laws, Ch. 508, 1952 as amended) requiring the state Public Service Commission to certify for the appraisers reporting to the condemnation court, the rate base, reasonable prospective annual earnings thereon, and rate of return applicable to the "operating unit" subject to condemnation. Hearings before a Public Service Commission Examiner on the matters subject to the statutorily required certification (PSC Case 26824) have been completed but no decision thereon has been rendered by the state Commission. Thereafter pleadings by way of answer or motions by Niagara directed to Massena's proposed condemnation action will follow. It appears that Massena is presently



## MOTION TO DISMISS INVESTIGATION

-8-

In sum, it is clear Massena only wants a forum to air its grievances against Niagara because Niagara has not, to date, been pinned down to a voluntary agreement that Niagara will transmit PASNY power for a Massena municipal electric distribution system when, as and if Massena acquires such a system and when, as and if Massena effectively contracts with PASNY for a supply of necessary power. Under these facts, there is no issue upon which the Commission can act, assuming its jurisdiction extends to countenancing Massena's wails. In fact, the Commission Order of June 2, 1975 specifically noted that "the Commission is not authorized to compel Niagara to enter into an agreement to provide electric service to Massena."

Obviously, Massena is not yet hurt. Niagara has advised Massena that if Niagara becomes subject to an obligation to wheel PASNY power to Massena, it will do so at rates supportable before whatever Commission may have jurisdiction in the premises.

How, then, can the Commission have jurisdiction to investigate Massena's complaint, admittedly not reasonably related to the Commission's action in permitting the transmission service agreement to become effective?

(footnote continued)

far, in point of time, from acquiring, much less operating its own municipal electric distribution system. All these representations bear directly on the legitimate interest, if any, of Massena in matters as to which the Federal Power Commission has taken definitive action, and, as stated heretofore, will be academic before Massena, if ever, may purchase PASNY power with a requirement that it be transmitted to Massena over Niagara's lines. Cf. "There is many a slip twixt the cup and the lip." Palladas, Greek Anthology, Bk. X, epigram 32 (probably about A.D. 400).

MOTION TO DISMISS INVESTIGATION

---

-9-

Grounds for Dismissal

Niagara represents the Commission lacks jurisdiction pursuant to Section 206 of the Act to institute an investigation of Massena's charges. In addition to the Commission's own denial of power to compel Niagara to enter into an agreement to provide electric transmission service to Massena (Order, June 2, 1975, pp. 3-4), Section 206 plainly confines Commission action as respects Niagara

"...to any transmission or sale subject to the jurisdiction of the Commission ..."

Here there is yet no entity for transmission by Niagara to it. The Commission has no roving mandate to dictate action by a public utility where there is no entity on whose behalf the Commission may act. Even Section 202(b) of the Act relating to mandatory interconnection orders confines Commission jurisdiction to "application ... of any person engaged in the transmission or sale of electric energy". Under Section 202 the Commission thus only may prescribe physical connection "if the Commission finds that no undue burden will be placed upon such public utility thereby."

Massena is attempting to trap the Commission into investigating - and possibly attempting some action thereon - a matter palpably beyond its jurisdiction. Because Massena charges "anti-competitive practices" does not create a power in the Commission under its statutory authority to act upon the facts before it.



## MOTION TO DISMISS INVESTIGATION

-10-

Again, as noted in Niagara's opposition to Massena intervention filed May 19, 1975, and as stated in Northern California Power Agency v. F.P.C., supra, "... we think it appropriate to suggest that existing anti-trust laws may well be the most beneficial means of airing ... [Massena's] grievances" (fn. 3, p. 189).

Niagara respectfully submits that the Commission should by appropriate Order dismiss the investigation mandated by its Order issued July 23, 1975.

Respectfully submitted,

NIAGARA MOHAWK POWER CORPORATION

By

*Lauman Martin*

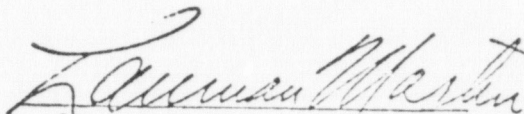
Lauman Martin  
Senior Vice President  
and General Counsel

Shea Gould Climenko Kramer & Casey  
330 Madison Avenue  
New York, New York 10017  
Bernard D. Fischman, Esq.  
Of Counsel

MOTION TO DISMISS INVESTIGATION

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing  
Motion on all parties of record in this proceeding.

  
Lauman Martin, Attorney for  
Niagara Mohawk Power Corporation

Dated: August 12, 1975  
Syracuse, New York



NIAGARA MOHAWK POWER CO  
ACTIVE FPC RATE SCHED

FPC Rate Schedule Number	Agreement With	
R-1	Village of Green Island	Sale for Resa
R-1	Village of Richmondville	Sale for Resa
3	New England Power Co.	Interchange p
4	Hydro-Quebec Electric Comm.	Power & ener
9	PENELEC	Ceres delive
12	HEPC of Ontario	Interchange p
13	CNP Co. Ltd.	Emergency p
18	PASNY	Transmission
		Power to P
19	PASNY	Transmission
		Power to P
20	Long Sault, Inc.	Emergency s
		resale at C
22	PASNY	Sale to PASN
		aluminum
23	Long Sault, Inc.	Metering and
		flow of po
24	Village of Holley	Sale for resa
25	Village of Brocton	Sale for resa
33	NYS E&G Corp.	Transmission
		for deliver
35	PASNY	Transmisstor
		Vermont st
37	NYSE&G Corp.	Borderline d

# APPENDIX A

Page 1

INCORPORATION  
BYLAWS

<u>Description</u>	<u>Agreement Dated</u>
le	4-24-67
le	5-26-67
power	10-24-40
ty for resale in Quebec	11-08-48
ry	12-30-52
power	7-01-54
power to CNP	9-09-54
and delivery of St. Lawrence	3-01-57
PASNY customers	
and delivery of Niagara	2-10-61
PASNY customers	
service to Long Sault for	1-08-62
Cedars Rapids	
Y of power for operation of	1-15-63
reduction plants	
d billing of unscheduled	1-01-60
wer	
le	5-21-59
le	5-08-58
n of PASNY power to NYSE&G	5-28-57
ry to municipal customers	
n for PASNY to New York-	12-11-61
ate line	
deliveries	7-30-64

MOTION TO DISMISS INVESTIGATION

APPENDIX A TO

82a



FPC Rate Schedule Number	Agreement With	Des
38	PASNY	Transmissio and Vermo
41	Central Hudson G&E Corp.	NM Borderl
44	RG&E Corp.	Borderline d
45	PASNY & NYSE&G Corp.	Transmit PA Electric C
48	RG&E Corp.	Reimbursem flow of 12
50	NYSE&G Corp.	Power pool
51	NYSE&G Corp.	Transmissio
55	Central Hudson G&E Corp.	Transmissio FPC No.
58	RG&E Corp.	Transmissio supersed
69	Rochester Gas & Elec. Corp.	Interchange
72	PASNY	Transmissio
74	NEPOOL Companies	Interchange
76	RG&E Corp.	Transmissio
77	Central Hudson G&E Corp.	Transmissio
82	New York Power Pool	Eight Party
85	Consolidated Edison	Transmissio
86	NYPP-PJM	Interconnec
87	Consolidated Edison	Transmissio Consolid

APPENDIX A  
Page 2

Description	Agreement Dated
on for PASNY to Plattsburg	1-25-56
ont	
ne Deliveries to C.H.	7-27-64
Deliveries	2-16-65
SNY power to Allegheny	8-04-65
Co-op, Inc.	
ent for losses arising from	4-25-66
PASNY power to RG&E	
participation agreement	7-21-66
on by NMPC for NYSE&G Corp.	7-21-66
on service, supersedes	11-17-67
34	
on service to RGE, to	12-26-68
FPC No. 42	
e of power	3-29-71
on service to Reynolds Metals Co.	4-22-71
e of power and energy	11-01-71
on service (Blenheim-Gilboa)	4-12-73
on service (Blenheim-Gilboa)	4-12-73
Agreement	2-01-74
on of Hydro-Quebec	9-30-74
ction Agreement	4- 9-74
on of RG&E power to	3- 7-75
dated Edison	

MOTION TO DISMISS INVESTIGATION  
APPENDIX A TO

83a



FEDERAL POWER COMMISSION ORDER  
ISSUED SEPTEMBER 25, 1975

UNITED STATES OF AMERICA  
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman;  
Don S. Smith, and John H. Holloman III.

Niagara Mohawk Power  
Corporation

)  
)

Docket No. E-9379



ORDER DENYING MOTION TO DISMISS INVESTIGATION

(Issued September 25, 1975)

On August 14, 1975, the Niagara Mohawk Power Corporation (Niagara) filed a Motion to Dismiss the Investigation in the above-captioned proceeding. That Motion seeks a reversal of this Commission's Order of July 23, 1975, wherein we granted the Town of Massena, New York's (Massena) Application for Reconsideration and ordered the institution of an investigation, pursuant to Section 206 of the Federal Power Act, of alleged anticompetitive practices by Niagara. Niagara is seeking dismissal of the investigation ordered by the Commission on July 23, 1975, based on its belief that the Commission lacks jurisdiction pursuant to Section 206 of the Federal Power Act to investigate Massena's charges.

On June 2, 1975, we issued an order accepting for filing and approving a proposed rate schedule for the transmission of power and energy between Niagara and the Consolidated Edison Company of New York, Inc., as submitted for filing on April 14, 1975, by Niagara. That order denied Massena's May 5, 1975 motion to reject or suspend the Niagara rate filing, wherein Massena contended that Niagara's rate filing was part of an interstate program and combination to unlawfully monopolize the electric utility industry. That contention was based

85a  
FEDERAL POWER COMMISSION ORDER  
ISSUED SEPTEMBER 25, 1975

Docket No. E-9379

-2-

upon Niagara's alleged refusal to enter into negotiation's leading to a contract by which Niagara would wheel energy to Massena, thereby enabling Massena to establish a municipally owned and operated electric system. Massena concluded that the revenues Niagara would receive from the filing therein would be unlawfully used by the Company to strengthen its alleged monopolistic position over transmission in the Massena service area to the detriment of Massena.

On June 23, 1975, Massena applied for rehearing of our order of June 2, averring they had suffered discrimination at the hands of Niagara due to the latter's refusal to execute voluntarily a transmission agreement with Massena. By order issued July 23, 1975, we granted rehearing and ordered an investigation, pursuant to Section 206, of Massena's allegations that Niagara's rate filing was part of an interstate program to unlawfully monopolize the electric utility industry and discriminate against the establishment by Massena of a municipal energy system.

Niagara's instant pleading contends Massena's intervention in this proceeding is "solely to assert its concern about a completely unrelated matter-namely, whether or not, in the event Massena can eventually acquire a municipal electric distribution system, will Niagara provide it transmission service for the PASNY power Massena expects to contract for."

Niagara adds that no real issue exists providing the Commission a basis on which it can grant relief, especially noting "... the Commission is not authorized to compel Niagara to enter into an agreement to provide electric service to Massena," as stated in our order of June 2, 1975. Niagara further premises its belief that the Commission lacks jurisdiction to order an investigation on its declaration that no entity exists on whose behalf the Commission can act, since there is no body to which Niagara can transmit energy at present.



86a  
FEDERAL POWER COMMISSION ORDER  
ISSUED SEPTEMBER 25, 1975

Docket No. E-9379

-3-

On August 27, 1975, Massena filed a "memorandum" opposing Niagara's motion to dismiss the investigation. Massena reiterates its primary contention that Niagara deals with investor-owned utilities within and without the state of New York and that Niagara to date has refused to negotiate a contract to wheel power to Massena when Massena completes its acquisition of the Company's electrical distribution system within the Town of Massena.

Our review of the pleadings filed in this docket with regard to the allegation of anticompetitive practices by Niagara indicates we do not have sufficient facts before us in order to formulate a decision. Massena alleges it has been disadvantaged by Niagara's discriminatory treatment. We believe an investigation, pursuant to Section 206 of the Federal Power Act, as previously ordered, is necessary to explore that allegation.

The Commission finds:

Good cause exists to deny Niagara's motion to dismiss the investigation under Section 206 of the Federal Power Act ordered in the above-referenced docket.

The Commission orders:

(A) Niagara's motion to dismiss the Section 206 investigation ordered pursuant to the Federal Power Act in Docket No. E-9379 is denied.

(B) The Secretary shall cause prompt publication of this order in the Federal Register.

By the Commission.

( S E A L )

Kenneth F. Plumb,  
Secretary

## APPLICATION OF NIAGARA MOHAWK FOR REHEARING

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL POWER COMMISSION

Niagara Mohawk Power Corporation )

Docket No. E-9379

APPLICATION OF NIAGARA MOHAWK POWER CORPORATION  
FOR REHEARING OF ORDER ISSUED SEPTEMBER 25, 1975  
PLUS REQUEST FOR DEFERMENT AND MODIFICATION  
OF ORDERING CLAUSE (B) OF ORDER ISSUED JULY 23, 1975

Niagara Mohawk Power Corporation ("NM") applies for rehearing of Commission order issued September 25, 1975 Denying Motion to Dismiss investigation and requests the Commission on rehearing to issue its order dismissing the investigation to be instituted pursuant to Commission order issued July 23, 1975.

NM, particularly in light of its rehearing application herewith, further requests the Commission to defer compliance with directions contained in Ordering Clause (B) of Order issued July 23, 1975, and in any event to modify such order as hereinafter proposed.

Preliminary Statement

The contretemps arising from the insertion by the Town of Massena ("Massena") (Petition to Intervene, filed May 5, 1975) into NM activities unrelated to Massena's future electric requirements has led the Com-



## APPLICATION OF NIAGARA MOHAWK FOR REHEARING

-2-

mission (perhaps, unwittingly) into undertaking an investigation which does not relate to the original subject matter of Docket E-9379. That Docket, by its terms (Notice of Filing, dated April 18, 1975), was confined to whether or not the Commission should accept for filing an agreement between NM and Consolidated Edison Company of New York, Inc. ("Con Ed") for transmission of power and energy by NM to the latter from Rochester Gas and Electric Corporation ("RGE").

Massena's intervention petition sought specifically as relief only that the Commission

"reject the filing or ... withhold acceptance for filing ... pending full investigation and hearing, or ... suspend ... the filing for five months and order a hearing ... [and] order a conference of the parties ..." (p. 12).

Despite Massena's intervention, the Commission accepted the tendered agreement for filing (Order issued June 2, 1975) specifically finding Massena's motion for rejection or suspension should be denied:

"After careful review we believe the latter does not address the issue presented for consideration under this filing, that is, whether the proposed rate schedule for the transmission service between Rochester and Con Ed provides for just and reasonable rates consistent with the public interest." (p. 3)

The Commission added:

"Our review of Massena's pleadings, and the responses thereto indicates that a reasonable and sufficient nexus has not been established by Massena between the alleged monopolistic, anticompetitive practices and designs of Niagara and the proposed electric transmission service agreement herein

## APPLICATION OF NIAGARA MOHAWK FOR REHEARING

-3-

filed with the Commission. Moreover, without demonstrating substantial anticompetitive practices, Massena has failed to indicate what possible harm it will experience as the result of the instant rate schedule filing. As conceded by Massena, the Commission is not authorized to compel Niagara to enter into an agreement to provide electric transmission service to Massena.<sup>2/</sup> Massena's desire to establish a municipally owned and operated electric distribution system is unrelated to the immediate issue raised in this filing.

<sup>2/</sup> Otter Tail, supra. "

Thereafter by order issued July 23, 1975 the Commission granted Massena rehearing, finding:

"In view of the allegation raised by the intervenor Massena herein, that Niagara's rate filing is part of an interstate program to unlawfully monopolize the electric utility industry and discriminate against the establishment by Massena of a municipal energy system, we find it is proper and appropriate in the public interest that the Application for Rehearing should be granted and an investigation pursuant to Section 206 of the Federal Power Act be instituted." (p. 3)

Again note that the finding is confined to "Niagara's rate filing" which had been fully accepted by the Commission as "consistent with the public interest".

In its most recent order (September 25, 1975), the Commission now finds:

"... with regard to the allegation of anti-competitive practices by Niagara ... we do not have sufficient facts before us in order to formulate a decision" (p. 3).

The foregoing is a far cry from Massena's protest that the now-approved and almost terminated (October 31, 1975, p. 1 order issued June 2, 1975) transmission service agreement is anti-competitive (Massena Petition, filed May 5, 1975, par. 6, p. 8).



APPLICATION OF NIAGARA MOHAWK FOR REHEARING

---

-4-

Finally, the Commission, on the plea of Massena, has been euchred into an untenable position of exploring Massena's allegation that NM is guilty of anticompetitive practices (Order issued September 25, 1975, p. 3).

Preliminarily, in sum, the Commission would now undertake an investigation of NM's alleged anticompetitive practices at the urging of a non-existent, but possibly embryo, municipal electric distribution system, simply because complainant intervened in a transmission rate filing unrelated to any possible interest of Massena, which the Commission fulsomely approved and as to which complainant Massena has not contested that approval.

Argument for  
Dismissal of Investigation

Section 206, as to which there is virtually no legislative history other than basically the words in its final enactment, simply authorizes, as conceivably relevant here,

"(a) Whenever the Commission, after a hearing ... shall find ... that any ... practice ... affecting such rate ... is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable ... practice ... to be thereafter observed and in force, and shall fix the same by order." (Emphasis supplied)

The key to Section 206 is the existence of a rate as to which the Commission has jurisdictional authority over which to act. There is no rate of NM in existence for service to a non-existent, inchoate at best, municipal electric distribution system.

## APPLICATION OF NIAGARA MOHAWK FOR REHEARING

-5-

If, following court review of this petition for rehearing, should the instant application be denied, the Commission may be authorized to pursue the investigation somewhat confusedly set forth in its orders issued June 2, 1975, July 23, 1975, and September 25, 1975, no order directed to NM for service to the non-existent Massena electric distribution system can be forthcoming. Admittedly the Commission cannot presently direct NM to serve Massena. The weakness of Massena's present quest for Commission action is disclosed by its frank admission and allegation that NM has refused to negotiate a wheeling contract "when Massena completes its acquisition of the Company's electrical distribution system within the Town of Massena" ( Memorandum filed August 27, 1975, p. 3). Thus, Massena appropriately admits its real interest in transmission begins only when it acquires a distribution system. When, as and if, Massena does acquire NM's municipal electric distribution system, it, according to Massena, can get emergency relief for a required interconnection pursuant to Section 202 of the Act.<sup>1/</sup>

<sup>1/</sup> In an affidavit dated August 30, 1975 by Counsel for Massena in Town of Massena v. Niagara Mohawk Power Corporation, County Court, St. Lawrence County, Index No. 59243, he averred: "In the event that PASNY is unable to make the necessary contractual arrangements with Niagara Mohawk Power Corporation for the delivery of bulk power to the Town of Massena, the Town of Massena will file a Petition for emergency relief pursuant to Section 202 of the Federal Power Act with the Federal Power Commission. Under the latter provision, the Town of Massena has an absolute right to electrical interconnection with the operator of the backbone trans-



## APPLICATION OF NIAGARA MOHAWK FOR REHEARING

-6-

It would thus appear that the preliminary jousting currently prolonged through tolerance of the Commission should now be at its end.

The foregoing, it is respectfully submitted, mandates termination of the investigation.

Section 206 of the Act  
Does not Authorize or Encompass  
the Proposed Investigation

Section 206 by its terms confines a Commission investigation to "any rate" or to a practice "affecting such rate". There is no rate for Massena because there is no distribution purchaser to whom NM could sell a transmission power service.

Moreover, if NM's alleged "intransigence" (Petition to Intervene, p. 8) and "recalcitrance" (Memorandum, p. 3) are deemed to bring NM within the possible liabilities arising from conduct contrary to the anti-trust laws, Massena's proper remedy is to step into the court house. Otter Tail Power Co. v. U.S., 410 U.S. 366 (1973); Northern California Power Agency v. F.P.C., 514 F 2d 184 (1975). Admittedly the Com-

fn. continued

mission system in the area, i.e., Niagara Mohawk Power Corporation. Summary and immediate relief is available to the Town of Massena under Section 202 of the Federal Power Act, and, if necessary, the Federal Power Commission will order the interconnection and prescribe the conditions thereunder once FPC jurisdiction is invoked."

## APPLICATION OF NIAGARA MOHAWK FOR REHEARING

-7-

mission can't, even after investigation and hearing, direct NM to contract with Massena for transmission service before Massena has an electric distribution system to attach to a transmission service. The Commission has so found (Order issued June 2, 1975, pp. 3-4) and Massena so admits (Petition, pp. 10-11; Order issued June 2, 1975, pp. 2, 3-4).

Under these circumstances, it seems bootless for the Commission to pursue Massena's wails at this stage of the game when, admittedly, no definitive action by the Commission can follow its proposed investigation and hearing.

Further, despite Massena's allegations that NM "has refused to agree in principle" (Rehearing Application, filed June 19, 1975, p. 3) to wheel power for Massena, when, as and if it has a system for NM to wheel to, NM has readily admitted that:

"If at some future time, Niagara Mohawk is to be obligated to supply transmission service to a Town of Massena electric distribution system, Niagara Mohawk's charges for such service obviously must be fixed within the limitations applicable thereto imposed by any regulatory agency having jurisdiction in the premises" (letter NM to Massena Counsel dated February 21, 1975, Exhibit D to Petition to Intervene). <sup>2/</sup>

Certainly NM's comment does not present a flat refusal to entertain such a service. NM is aware both of Section 202(b) of the Act and of anti-trust

<sup>2/</sup> NM does not visualize, as apparently does Massena, that "even when bargaining in good faith, hard, and perhaps prolonged negotiations are most probably, preconditions to finalization of an agreement to wheel power" (Memorandum, August 27, 1975, p. 4).



## APPLICATION OF NIAGARA MOHAWK FOR REHEARING

-8-

law possibilities should Massena finally acquire electric distribution facilities.

Meanwhile, it is reasonable to speculate - forgetting lack of legal authority in the Commission to force action by NM to contract to transmit electricity to a non-existent Massena electric distribution system - to just what compensation NM is entitled for reserving transmission space in the indeterminate period before actual service by a Massena electric distribution system - if ever - should commence?

It is respectfully submitted that Section 206 of the Act does not authorize the Commission to subject NM to the virtual harassment of an investigation when such investigation cannot lead to definitive action by the Commission and where the very clear language of Section 206 precludes institution of the instant proposed investigation.

The Procedural Requirements of  
Ordering Clause (B) of the Order  
Issued July 23, 1975 Should be  
Both Deferred and Modified

Since NM is applying for rehearing of the Order issued September 25, 1975, it is necessary and appropriate that the procedural schedule set forth in clause (B) of the July 23, 1975 order be deferred indefinitely pending final and definitive action on rehearing of the application to dismiss the investigation, and NM so requests.

Ultimately, if the investigation directed in the July 23, 1975 order

## APPLICATION OF NIAGARA MOHAWK FOR REHEARING

-9-

is to be carried out, common fairness requires that the order of presentation of testimony be rearranged.

The September 25, 1975 order notes:

"Our review of the pleadings filed in this docket with regard to the allegation of anticompetitive practices by Niagara indicates we do not have sufficient facts before us in order to formulate a decision. Massena alleges it has been disadvantaged by Niagara's discriminatory treatment. We believe an investigation, pursuant to Section 206 of the Federal Power Act, as previously ordered, is necessary to explore that allegation."

The subject matter of the proposed investigation is thus necessarily and now clearly confined to alleged discriminatory treatment of Massena by NM. That being the case, let Massena submit its evidence first. Thereafter Staff, if it has any testimony or prepared exhibits, should then follow Massena, and then NM, if the occasion requires, should serve its testimony. Otherwise NM is at best subjected to proving a negative without any evidence before it to indicate for what it may be deemed answerable.

Conclusion

NM respectfully requests that upon rehearing the Commission dismiss its proposed investigation on the ground that it does not lie within the ambit of Section 206 of the Act, and, further, that the investigation cannot result in any order by the Commission requiring NM to act in respect of Massena's allegation of discriminatory treatment.

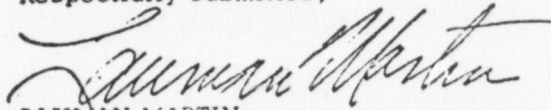


## APPLICATION OF NIAGARA MOHAWK FOR REHEARING

-10-

NM further respectfully requests the Commission to defer compliance with Clause (B) of the July 23, 1975 order pending final determination of the instant application for rehearing, and, thereafter, if the proposed investigation is to be conducted that the order of presentation be modified as above requested.

Respectfully submitted,



LAUMAN MARTIN  
Senior Vice President and  
General Counsel

SHEA GOULD CLIMENKO KRAMER & CASEY  
330 Madison Avenue  
New York, New York 10017

By: BERNARD D. FISCHMAN, Esq.  
of Counsel

For Niagara Mohawk Power Corporation  
300 Erie Boulevard West  
Syracuse, New York 13202

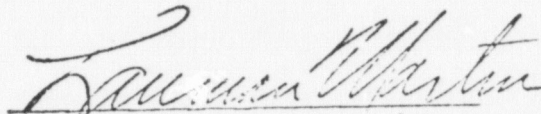
Dated: October 8, 1975

## APPLICATION OF NIAGARA MOHAWK FOR REHEARING

-11-

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing  
Application for Rehearing on all parties of record in this proceeding.



Lauman Martin, Attorney for  
Niagara Mohawk Power Corporation

Dated: October 9, 1975  
Syracuse, New York



MASSENA'S RESPONSE TO NIAGARA MOHAWK'S  
REQUEST FOR DEFERMENT

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL POWER COMMISSION

-----  
NIAGARA MOHAWK POWER CORPORATION ) Docket No. E-9379  
-----

RESPONSE OF THE TOWN OF MASSENA TO  
NIAGARA MOHAWK POWER CORPORATION'S REQUEST  
FOR DEFERMENT AND MODIFICATION OF ORDERING  
CLAUSE (B) OF ORDER ISSUED JULY 23, 1975

In still a further attempt to avoid a final reckoning with its refusal to meet a duty to provide transmission service on a non-discriminatory basis, Niagara Mohawk Power Corporation (Niagara Mohawk) has petitioned for rehearing the Commission's September 25, 1975 Order denying Niagara Mohawk's request to dismiss the Section 206 investigation initiated by this Commission by Order of July 23, 1975. Niagara Mohawk further "requests," in the alternative, a "deferment" of the proceedings pending an intended appeal by Niagara Mohawk or, in the alternative, a "rearrangement" of the order of testimony, requiring Massena to go first. In light of the fact that Niagara Mohawk goes beyond a petition for rehearing, Massena hereby responds to the additional requests made.

Niagara Mohawk's entire argument here is based on an alleged lack of Commission jurisdiction to take any action in the premises which would provide Massena with relief from claimed discriminatory practices.

Niagara Mohawk's argument is based on the pre-

MASSENA'S RESPONSE TO NIAGARA MOHAWK'S  
REQUEST FOR DEFERMENT

- 2 -

mise that since no rate has been established between itself and Massena, the Commission has no jurisdictional basis to investigate a continuing refusal to deal. But this argument overlooks the fact that Niagara Mohawk's refusal to deal with Massena inevitably impacts rates that are subject to this Commission's jurisdiction. To state the obvious, a refusal to utilize under utilized transmission facilities means lower revenues for Niagara Mohawk and thus higher rates for jurisdictional customers. Surely this refusal to deal is a "practice" which affects "rates" within the meaning of Section 206(a).

Likewise, Niagara Mohawk's refusal to deal prevents the entry of a competitor into the electric utility industry. To the extent Niagara Mohawk is successful in resisting the establishment of a competing utility in Massena, both wholesale and retail rates are impacted by the refusal.

Section 206(b) provides a separate basis for investigation here:

The Commission.....may investigate and determine the cost of the..... transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

Thus if, as Niagara Mohawk asserts, the Commission has no jurisdiction to order wheeling, it follows



MASSENA'S RESPONSE TO NIAGARA MOHAWK'S  
REQUEST FOR DEFERMENT

- 3 -

that the Commission has no jurisdiction to "establish" (or order) a rate for wheeling under Section 206(a) within the meaning of Section 206(b). But it is nevertheless appropriate for the Commission to investigate all of Niagara Mohawk's wheeling arrangements for purposes of determining if discrimination exists, and for ascertaining the costs of Massena's requested wheeling under Section 206(b).

Niagara Mohawk also overlooks the fact that the Power Authority of the State of New York (PASNY) is a licensee of this Commission under 16 U.S.C. §836. Subsection (b)(4) requires this Commission to impose upon PASNY the duty to provide transmission service to preference customers, including Massena. Niagara Mohawk is interconnected with PASNY, Niagara Mohawk purchases a substantial amount of low cost power and energy from PASNY, and Niagara Mohawk regularly wheels power and energy to preference customers of PASNY.

Since Niagara Mohawk's practices are subject to this Commission's jurisdiction along with PASNY's, and since Niagara Mohawk owns and operates the backbone transmission system in the Massena service area, it becomes apparent that this Commission does have jurisdiction to consider Massena's allegations.

If Massena prevails and establishes its allegations, the Commission is empowered to enter an appropriate

MASSENA'S RESPONSE TO NIAGARA MOHAWK'S  
REQUEST FOR DEFERMENT

- 4 -

order requiring Niagara Mohawk to deal in a non-discriminatory manner with all entities seeking transmission services under Section 206 and to require delivery of PASNY power to Massena in a manner consistent with license conditions imposed under 16 U.S.C. §836.<sup>1/</sup>

It can be seen that Niagara Mohawk's spurious jurisdictional arguments provide no basis for a "deferment" or "rearrangement" of testimony. If Massena is to receive PASNY power and energy in early 1976, as Massena believes it will, it is mandatory that Niagara Mohawk be brought to task now for a continuing refusal to deal in good faith. Niagara Mohawk is under investigation here, and not Massena. If Niagara Mohawk feels justified in refusing to deal with Massena, it is up to the Company to present probative evidence in support of its position. If the Company is unable to go forth in support of its position, then Massena's allegations should be taken as true, and an appropriate order entered.<sup>2/</sup>

---

<sup>1/</sup> Massena would have no objection to an expansion of these proceedings to include PASNY if the Commission deems PASNY a necessary party in enforcing license terms under 16 U.S.C. §836.

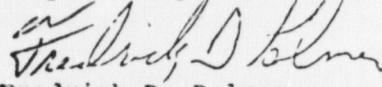
<sup>2/</sup> The only remaining issue then would be the appropriate design for interconnection. This phase of the proceeding should follow promptly on the heels of the present phase.



MASSENA'S RESPONSE TO NIAGARA MOHAWK'S  
REQUEST FOR DEFERMENT

---

Respectfully submitted,

  
Fredrick D. Palmer

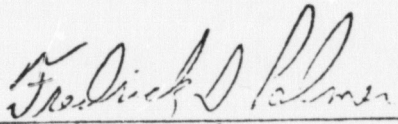
DUNCAN, BROWN, WEINBERG &  
PALMER  
1700 Pennsylvania Ave., NW  
Washington, D. C. 20006

Counsel for Town of Massena

MASSENA'S RESPONSE TO NIAGARA MOHAWK'S  
REQUEST FOR DEFERMENT

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of  
the foregoing Response on all parties of record by depos-  
iting copies thereof in the United States mail, postage  
prepaid, this 30th day of October, 1975.

  
Fredrick D. Palmer

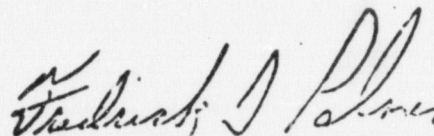


MASSENA'S RESPONSE TO NIAGARA MOHAWK'S  
REQUEST FOR DEFERMENT

## VERIFICATION

City of Washington :  
District of Columbia : SS:

FREDRICK D. PALMER, Being first duly sworn, deposes and says that he is the attorney for the Town of Massena, New York, and that he is authorized to execute and file the foregoing Response; that he has read said Response and is familiar with the contents thereof; and that all statements of fact therein set forth are true and correct, to the best of his knowledge, information and belief.

Fredrick D. Palmer

Subscribed and sworn to before me  
this \_\_\_\_\_ day of October, 1975.

\_\_\_\_\_  
Notary Public

My Commission Expires August 14, 1979

FEDERAL POWER COMMISSION ORDER  
ISSUED NOVEMBER 13, 1975

APPENDIX D

UNITED STATES OF AMERICA  
FEDERAL POWER COMMISSION



Before Commissioners: Richard L. Dunham, Chairman;  
William L. Springer, Don S. Smith,  
and John H. Holloman III.

Niagara Mohawk Power Corporation ) Docket No. E-9379

ORDER DENYING REHEARING AND MODIFYING PROCEDURAL DATES

(Issued November 13, 1975)

On October 14, 1975, Niagara Mohawk Power Corporation (Niagara) applied for rehearing of our Order Denying Motion To Dismiss Investigation, issued September 25, 1975, in the above-captioned docket. In addition, Niagara requests that the Commission defer indefinitely the procedural dates in this proceeding, as established in Ordering Paragraph (B) of our Order issued July 23, 1975, pending final determination of the instant application for rehearing; and, thereafter, if the proposed investigation is conducted, that the order of presentation of the evidence be modified.

This proceeding originated when, on June 2, 1975, we issued an order accepting for filing and approving a proposed rate schedule for the transmission of power and energy between Niagara and the Consolidated Edison Company of New York, Inc., as submitted for filing on April 14, 1975, by Niagara. That order denied the Town of Massena, New York's (Massena) May 5, 1975, motion to reject or suspend the Niagara rate filing, wherein Massena contends that Niagara's rate filing was part of an interstate program and combination to unlawfully monopolize the electric utility industry. That contention was based upon Niagara's alleged refusal to enter into negotiations leading to a contract by which Niagara



106a

FEDERAL POWER COMMISSION ORDER  
ISSUED NOVEMBER 13, 1975

Docket No. E-9379

-2-

would wheel energy to Massena, thereby enabling Massena to establish a municipally owned and operated electric system. Massena concluded that the revenues Niagara would receive from the filing therein would be unlawfully used by the Company to strengthen its alleged monopolistic position over transmission in the Massena service area to the detriment of Massena.

On June 23, 1975, Massena applied for rehearing of our order of June 2, averring they had suffered discrimination at the hands of Niagara due to the latter's refusal to execute voluntarily a transmission agreement with Massena. By order issued July 23, 1975, we granted rehearing and ordered an investigation, pursuant to Section 206, of Massena's allegations that Niagara's rate filing was part of an interstate program to unlawfully monopolize the electric utility industry and discriminate against the establishment by Massena of a municipal energy system.

On August 14, 1975, Niagara sought reversal of our July 23, 1975, order and moved that the Commission dismiss the investigation. By order issued September 25, 1975, we denied Niagara's motion, stating that we ". . . /did/ not have sufficient facts before us in order to formulate a decision" and our belief that ". . . an investigation, pursuant to Section 206 of the Federal Power Act, as previously ordered, is necessary to explore that /Massena's/ allegation".

Niagara's instant pleading contends that Section 206 of the Act does not authorize such an investigation and that the Commission, as a result of an investigation, cannot order Niagara to act with respect to Massena's allegation of discriminatory treatment.

With regard to the purview of Section 206, Niagara cites paragraph (a) 1/ thereof and asserts, "(t)he key to Section 206 is the existence of a rate as to which the Commission has jurisdictional authority over which to act . . ." and again, that "Section 206

---

1/ Sec. 206(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charges, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. (49 Stat. 852; 16 U.S.C. 824c(a))

FEDERAL POWER COMMISSION ORDER  
ISSUED NOVEMBER 13, 1975

Docket No. E-9379

-3-

by its terms confines a Commission investigation to 'any rate' or to a practice 'affecting such rate'. There is no rate for Massena because there is no distribution purchaser to whom NM /Niagara/ could sell a transmission power system."

In the event the Commission does pursue the investigation upon which it has entered, Niagara maintains that the Commission could not issue an order that Niagara serve the Massena system so long as Massena has not yet acquired the municipal electric distribution system; and, further, at such time as Massena does acquire the system, Massena may seek emergency relief for a required interconnection pursuant to Section 202 of the Act. Niagara asserts it has not refused to provide the service to Massena at such time as Massena has a system to which it can wheel power, but that meanwhile, Niagara queries to what compensation it would be entitled should it be forced to reserve transmission space for an indeterminate period before actual service by Massena's electric distribution system commences.

Niagara further requests that the procedural dates set forth in Ordering Paragraph (B) of our July 23, 1975, order be deferred indefinitely "pending final and definitive action on rehearing of the application to dismiss the investigation. . .". In the event the investigation ultimately is pursued, Niagara requests that Massena be scheduled first to present its evidence, in that the issue of alleged discriminatory treatment of Massena by Niagara was introduced by Massena.

On October 21, 1975, Massena filed its response to Niagara's pleading. With respect to Niagara's contention that since no rate has been established, the Commission has no jurisdictional basis to investigate a continuing refusal to deal, Massena declares that Niagara's action has an impact on jurisdictional rates. That is, Niagara creates higher rates for jurisdictional customers when it refuses to fully utilize its transmission lines and, as a consequence, lower revenues. Hence, a practice which affects rates within the meaning of Section 206(a) is established, according to Massena. In addition, the barring of a competitor's entry into the electric utility industry has an impact on rates.



FEDERAL POWER COMMISSION ORDER  
ISSUED NOVEMBER 13, 1975

Docket No. E-9379

-4-

Massena also contends Section 206(b) 2/ provides a separate basis for investigation, in that the Commission may investigate all of Niagara's wheeling arrangements for the purpose of determining whether discrimination exists and for ascertaining the costs of Massena's requested wheeling. Moreover, because the Power Authority of the State of New York (PASNY) is subject to the jurisdiction of this Commission and Niagara wheels PASNY power to other preference customers and since Niagara owns the transmission system in the Massena area (also a preference customer of PASNY's), then the Commission has jurisdiction over Massena's allegations. Following an investigation, according to Massena, the Commission could order Niagara not to discriminate with respect to transmission service offerings and to require delivery of PASNY power to Massena.

Massena, furthermore, objects to Niagara's request to defer or rearrange the procedural schedule, contending Niagara must first justify its alleged refusal to deal with Massena; otherwise, Massena's allegations should be taken as true.

After careful review, we believe that the allegations raised by Massena warrant an investigation and that the Commission has jurisdiction under Section 206 of the Act to proceed with that investigation. Niagara misinterprets the scope of Section 206 when it asserts an existing rate must be the condition precedent to our entering into an investigation and must be the subject of that investigation. Section 206(a) makes not only "any rates, charges, or classification" the proper subject of an investigation, but also

---

2/ Sec. 206(b) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy. (49 Stat. 852; 16 U.S.C. 824e(b)).

109a  
FEDERAL POWER COMMISSION ORDER  
ISSUED NOVEMBER 13, 1975

Docket No. E-9379

-5-

"any rule, regulation, practice, or contract affecting such rate, charge, or classification" (emphasis supplied). Accordingly, Niagara's application for rehearing of our refusal to dismiss the 206 investigation will be denied.

Niagara's request with respect to the procedural dates established in this proceeding will be granted insofar as we believe the order of presentation of the evidence should be altered. Massena's allegations have induced us to enter upon an investigation of Niagara's practices. We believe in fairness that the party raising the anticompetitive practice issue has the burden of going forward with the evidence relating to the issue in order that Niagara may then knowledgeably respond to the allegations lodged against it. 3/ We shall extend the procedural dates previously established in this proceeding in light of our modifying the order in which evidence shall be presented; however, we will not suspend indefinitely the dates, as requested by Niagara.

The Commission finds:

(1) Niagara's application for rehearing of our order issued September 25, 1975, should be denied.

(2) Good cause exists to modify the order of presentation of evidence and procedural dates as previously established in this proceeding, by order issued July 23, 1975.

---

3/ See In the Matters of Seaboard Oil Company, Operator, et al., 19 FPC 416, 420.

See also Indiana & Michigan Electric Co., 49 FPC 1232 (1973). In the latter case, intervenors Richmond and Fort Wayne raised allegations of anticompetitive conduct by the applicant for the rate increase. The Commission stated, in discussing the burden on the intervenors to lay the factual basis for the allegations:

In this proceeding interventions have been granted and a hearing directed to consider inter alia anticompetitive allegations. However, we would expect that those who would raise such issues in appropriate proceedings would clearly specify the facts relied upon, anticompetitive practices challenged, and the requested relief which is within this Commission's authority to direct.



Docket No. E-9379

-6-

The Commission orders:

(A) Niagara's application for rehearing of our order issued September 25, 1975, is denied.

(B) Niagara's request for modification of Ordering Paragraph (B) of our order issued July 23, 1975, in this docket, wherein we established procedural dates and the order in which evidence would be served on those dates is hereby modified as follows:

Service of Massena's Testimony  
and Exhibits

November 25, 1975

Service of Staff's Testimony  
and Exhibits

December 16, 1975

Service of Niagara's Testimony  
and Exhibits

January 6, 1976

Hearing

January 27, 1976

(C) The Secretary shall cause prompt publication of this order in the Federal Register.

By the Commission.

( S E A L )

Kenneth F. Plumb,  
Secretary.

111a  
MOTION OF MASSENA  
TO EXTEND PROCEDURAL DATES

*Rec'd by mail 11/24*

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL POWER COMMISSION

Niagara Mohawk Power Corporation ) Docket No. E-9379

MOTION OF THE TOWN OF  
MASSENA, NEW YORK  
TO EXTEND PROCEDURAL DATES

By Order of the Commission dated November 13, 1975, the following schedule of Procedural Dates was established:

Service of Massena's Testimony and Exhibits -

November 25, 1975

Service of Staff's Testimony and Exhibits -

December 16, 1975

Service of Niagara Mohawk's Testimony and Exhibits -

January 6, 1976

Hearing

- January 27, 1976

In order to properly prepare its Testimony and Exhibits in this Docket, it is necessary that Massena undertake extensive discovery against Niagara Mohawk. It is hoped that this discovery will take place in mid-December.



112a  
MOTION OF MASSENA  
TO EXTEND PROCEDURAL DATES

---

- 2 -

To facilitate these plans for discovery and to allow Massena proper time in which to prepare its Testimony and Exhibits, Massena respectfully requests that the procedural dates be extended and established as follows:

Service of Massena's Testimony and Exhibits -

January 9, 1976

Service of Staff's Testimony and Exhibits -

February 2, 1976

Service of Niagara Mohawk's Testimony and Exhibits -

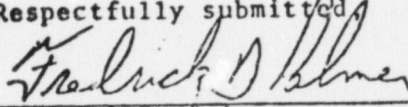
March 23, 1976

Hearing

- April 15, 1976

Counsel for Niagara Mohawk was contacted and indicated that Niagara Mohawk has no comment concerning this Motion. Staff Counsel was contacted and indicated that Staff Counsel is not opposed to this Motion.

Accordingly, Massena respectfully requests that the extension of time with the proposed dates set out above be granted.

Respectfully submitted,  
  
Fredrick D. Palmer

Duncan, Brown, Weinberg &  
Palmer  
1700 Pennsylvania Ave., NW  
Washington, D. C. 20006

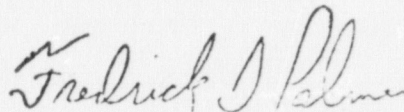
November 21, 1975

MOTION OF MASSENA  
TO EXTEND PROCEDURAL DATES

## VERIFICATION

City of Washington :  
District of Columbia :

Fredrick D. Palmer, being first duly sworn on oath says that he is the Attorney for the Town of Massena, New York, that he signs the foregoing Motion to Extend Procedural Dates, that he has read the foregoing Motion, and knows the contents thereof and that the same are true to the best of his knowledge and belief.



Fredrick D. Palmer

Attorney for the Town of  
Massena, New York

Subscribed and sworn to before me this 21st day of November, 1975.

Notary Public

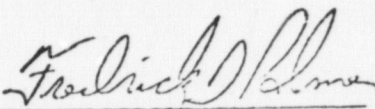
My Commission Expires August 11, 1979



MOTION OF MASSENA  
TO EXTEND PROCEDURAL DATES

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Motion upon all parties of record in this proceeding in accordance with the requirements of Section 1.17 of the Commission's Rules of Practice and Procedure.

  
Fredrick D. Palmer

DATED: November 21, 1975

NOTICE AND APPLICATION FOR DEPOSITIONS

---

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL POWER COMMISSION

-----  
NIAGARA MOHAWK POWER CORPORATION )  
-----

Docket No. E-9379

NOTICE AND APPLICATION FOR DEPOSITIONS  
AND APPLICATION FOR ISSUANCE OF SUBPENAS  
FOR DEPOSITION AND PRODUCTION OF DOCUMENTARY EVIDENCE

Wallace L. Duncan  
Fredrick D. Palmer

✓ DUNCAN, BROWN, WEINBERG  
& PALMER  
1700 Pennsylvania Ave., N.W.  
Washington, D.C. 20006  
(202) 296-4325

November 25, 1975



~~NOTICE AND APPLICATION FOR DEPOSITIONS~~

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL POWER COMMISSION

-----  
NIAGARA MOHAWK POWER CORPORATION )  
-----

Docket No. E-9379

NOTICE AND APPLICATION FOR DEPOSITIONS  
AND APPLICATION FOR ISSUANCE OF SUBPENAS  
FOR DEPOSITION AND PRODUCTION OF DOCUMENTARY EVIDENCE

COMES NOW the Town of Massena, New York (Massena) by and through its attorneys, Wallace L. Duncan, Esquire and Fredrick D. Palmer, Esquire, Duncan, Brown, Weinberg & Palmer, 1700 Pennsylvania Avenue, N.W., Washington, D.C. 20006, and gives notice and makes application, pursuant to Sections 1.23 and 1.24 of the Rules of Practice and Procedure of the Federal Power Commission, for the issuance of subpoenas to the below named parties to appear for deposition and to present documentary evidence as hereinbelow described. In support thereof, Massena states and shows this Commission as follows:

1. The subpoenas duces tecum have been prepared and are presented with this notice for execution by the Commission. Copies of these proposed subpoenas are attached hereto and designated as Appendices A through C.

~~NOTICE AND APPLICATION FOR DEPOSITIONS~~

-2-

2. Massena hereby gives notice and makes application to take the deposition of and requests the issuance of a subpoena, a copy of which is attached hereto as Appendix A, to John G. Haehl, Jr., President, Niagara Mohawk Power Corporation, 300 Erie Boulevard West, Syracuse, New York 13202.

2.1. Massena proposes to take the deposition of John G. Haehl, Jr. on the 9th day of December, 1975, at 10:00 o'clock in the forenoon and continuing to the next day, if necessary, before a Notary Public, David Robinson, Supreme Court Reporter, or his designated associate. Massena has arranged for a suitable office in which to take the deposition at Niagara Mohawk Power Corporation, 300 Erie Boulevard West, Syracuse, New York 13202.

2.2. Massena requests that John G. Haehl, Jr. give testimony at the deposition concerning any and all facts of which he has knowledge as a result of his duties and activities as President of the Niagara Mohawk Power Corporation (Niagara Mohawk) or as a result of any contact, discussion, study, conversation, meeting, application or any means whatsoever so far as relates to:

a. any and all rates, schedules, correspondence, feasibility studies, applications, negotiations, meetings, agreements, documents, discussions and memoranda which culminated in or resulted from any contractual arrangements for the transmission of electric power and energy between Niagara Mohawk and any investor-owned electric utility system;



NOTICE AND APPLICATION FOR DEPOSITIONS

-3-

b. any and all rates, schedules, correspondence, feasibility studies, applications, negotiations, meetings, agreements, documents, discussions and memoranda which culminated in or resulted from any contractual agreements for the transmission of electric power and energy between Niagara Mohawk and any municipal or consumer-owned electric utility system or any electric utility cooperative system;

c. any and all meetings, discussions, feasibility studies, correspondence, documents, reports, agreements and memoranda which culminated in or resulted from Niagara Mohawk's refusal to negotiate or bargain in good faith with Massena for a contract for the transmission of electric power and energy from the Power Authority of the State of New York to Massena;

d. any and all meetings, discussions, feasibility studies, correspondence, documents, reports, agreements and memoranda which culminated in or resulted from Niagara Mohawk's refusal to negotiate or bargain in good faith with or enter into a contractual relationship with any municipal or consumer-owned electric utility system or electric cooperative utility system which sought a contractual relationship with Niagara Mohawk for the sale or transmission of electric power or energy;

---

NOTICE AND APPLICATION FOR DEPOSITIONS

---

-4-

e. all expenditures of funds by Niagara Mohawk, including but not limited to, expenditures for advertising and legislative efforts in New York;

f. the form, nature and extent of advertising and legislative efforts undertaken by Niagara Mohawk.

The time period for which the above information is sought commences on January 1, 1965 and extends to the present time.

2.3 Massena requests the issuance of a subpoena, a copy of which is attached hereto as Appendix A, to John G. Haehl, Jr. instructing him to bring to the above-noticed deposition and to produce there any and all documents that are in his possession or control as relate to the matters described in Paragraph 2.2, supra. The requested documents include, but are not limited to, agreements, contracts, memoranda, letters, studies, reports, inquiries, applications, correspondence and the like.

2.4 Massena states as grounds for this application that the depositions and documents requested are material and relevant to this case and that it is essential to Massena to have these documents and take these depositions in order to prepare and prove its case in the above-captioned docket. Massena intends to establish in the above-captioned proceedings, inter alia, that Niagara Mohawk has to date refused to negotiate a contract to wheel power to Massena and that this refusal to deal is part of an interstate program and combination to unlawfully monopolize the electric utility industry and that the revenues Niagara Mohawk would receive from the filing herein would be



NOTICE AND APPLICATION FOR DEPOSITIONS

-5-

unlawfully used by Niagara Mohawk to achieve and strengthen its monopolistic position over transmission in the Massena service area.

3. Massena hereby gives notice and makes application to take the deposition of and requests the issuance of a subpoena, a copy of which is hereto attached as Appendix B, to Lauman Martin, Senior Vice President and Chief Counsel, Niagara Mohawk Power Corporation, 300 Erie Boulevard West, Syracuse, New York 13202.

3.1. Massena proposes to take the deposition of Lauman Martin on the 9th day of December, 1975 at 10:00 o'clock in the forenoon and continuing to the next day if necessary, before a Notary Public, David Robinson, Supreme Court Reporter, or his designated associate. Massena has arranged for a suitable office in which to take the deposition at Niagara Mohawk Power Corporation, 300 Erie Boulevard West, Syracuse, New York 13202.

3.2. Massena requests that Lauman Martin give testimony at the deposition concerning any and all facts of which he has knowledge as a result of his duties and activities as Senior Vice-President and Chief Counsel to Niagara Mohawk or as a result of any contact, discussion, study, conversation, meeting, application or any means whatsoever so far as relates to:

~~NOTICE AND APPLICATION FOR DEPOSITIONS~~

a. any and all rates, schedules, correspondence, feasibility studies, applications, negotiations, meetings, agreements, documents, discussions and memoranda which culminated in or resulted from any contractual arrangements for the transmission of electric power and energy between Niagara Mohawk and any investor-owned electric utility system;

b. any and all rates, schedules, correspondence, feasibility studies, applications, negotiations, meetings, agreements, documents, discussions and memoranda which culminated in or resulted from any contractual agreements for the transmission of electric power and energy between Niagara Mohawk and any municipal or consumer-owned electric utility system or any electric utility cooperative system;

c. any and all meetings, discussions, feasibility studies, correspondence, documents, reports, agreements and memoranda which culminated in or resulted from Niagara Mohawk's refusal to negotiate or bargain in good faith with Massena for a contract for the transmission of electric power and energy from the Power Authority of the State of New York to Massena;

d. any and all meetings, discussions, feasibility studies, correspondence, documents, reports, agreements and memoranda which culminated in or resulted from



NOTICE AND APPLICATION FOR DEPOSITIONS

-7-

Niagara Mohawk's refusal to negotiate or bargain in good faith with or enter into a contractual relationship with any municipal or consumer-owned electric utility system or electric cooperative utility system which sought a contractual relationship with Niagara Mohawk for the sale or transmission of electric power or energy.

e. all expenditures of funds by Niagara Mohawk, including but not limited to, expenditures for advertising and legislative efforts in New York;

f. the form, nature and extent of advertising and legislative efforts undertaken by Niagara Mohawk.

The time period for which the above information is sought commences on January 1, 1965 and extends to the present.

3.3. Massena requests the issuance of a subpoena, a copy of which is attached hereto as Appendix B, to Lauman Martin, instructing him to bring to the above-noticed deposition and to produce there any and all documents that are in his possession or control as relate to the matters described in Paragraph 3.2, supra. The requested documents include, but are not limited to, agreements, contracts, memoranda, letters, studies, reports, inquiries, applications, correspondence and the like.

3.4. Massena states as grounds for this application that the depositions and documents requested are material and

## NOTICE AND APPLICATION FOR DEPOSITIONS

-8-

relevant to this case and that it is essential to Massena to have these documents and take these depositions in order to prepare and prove its case in the above-captioned docket. Massena intends to establish in the above-captioned proceedings, inter alia, that Niagara Mohawk has to date refused to negotiate a contract to wheel power to Massena and that this refusal to deal is part of an interstate program and combination to unlawfully monopolize the electric utility industry and that the revenues Niagara Mohawk would receive from the filing herein would be unlawfully used by Niagara Mohawk to achieve and strengthen its monopolistic position over transmission in the Massena service area.

4. Massena hereby gives notice and makes application to take the deposition of and requests the issuance of a subpoena, a copy of which is attached hereto as Appendix C to James J. Miller, Vice President and General Manager, Central Division, Niagara Mohawk Power Corporation, 300 Erie Boulevard West, Syracuse, New York 13202.

4.1. Massena proposes to take the deposition of James J. Miller on the 9th day of December, 1975 at 10:00 o'clock in the forenoon and continuing to the following day if necessary, before a Notary Public, David Robinson, Supreme Court Reporter, or his designated associate. Massena has arranged for a suitable office in which to take the deposition at Niagara Mohawk Power Corporation, 300 Erie Boulevard West, Syracuse, New York 13202.



NOTICE AND APPLICATION FOR DEPOSITIONS

-9-

4.2. Massena requests that James J. Miller give testimony at the deposition concerning any and all facts of which he has knowledge as a result of his duties and activities as Vice President and General Manager, Central Division, Niagara Mohawk or as a result of any contact, discussion, study, conversation, meeting, application or any means whatsoever so far as relates to:

a. any and all rates, schedules, correspondence, feasibility studies, applications, negotiations, meetings, agreements, documents, discussions and memoranda which culminated in or resulted from any contractual arrangements for the transmission of electric power and energy between Niagara Mohawk and any investor-owned electric utility system;

b. any and all rates, schedules, correspondence, feasibility studies, applications, negotiations, meetings, agreements, documents, discussions and memoranda which culminated in or resulted from any contractual agreements for the transmission of electric power and energy between Niagara Mohawk and any municipal or consumer-owned electric utility system or any electric utility cooperative system;

c. any and all meetings, discussions, feasibility studies, correspondence, documents, reports, agreements and memoranda which culminated in or resulted from Niagara Mohawk's refusal to negotiate or bargain in good

---

NOTICE AND APPLICATION FOR DEPOSITIONS

---

-10-

faith with Massena for a contract for the transmission of electric power and energy from the Power Authority of the State of New York to Massena;

d. any and all meetings, discussions, feasibility studies, correspondence, documents, reports, agreements and memoranda which culminated in or resulted from Niagara Mohawk's refusal to negotiate or bargain in good faith with or enter into a contractual relationship with any municipal or consumer-owned electric utility system or electric cooperative utility system which sought a contractual relationship with Niagara Mohawk for the sale or transmission of electric power or energy;

e. all expenditures of funds by Niagara Mohawk, including but not limited to, expenditures for advertising and legislative efforts in New York;

f. the form, nature and extent of advertising and legislative efforts undertaken by Niagara Mohawk.

The time period for which the above information is sought commences on January 1, 1965 and extends to the present time.

4.3. Massena requests the issuance of a subpoena, a copy of which is attached hereto as Appendix C, to James J. Miller, instructing him to bring to the above-noticed deposition and to produce there any and all documents that are in his possession or control as related to the matters discussed in Paragraph 4.2, supra. The requested documents include, but are not limited to, agreements, contracts, memoranda, letters, studies, reports, inquiries, applications, correspondence and the like.



NOTICE AND APPLICATION FOR DEPOSITIONS

-11-

4.4. Massena states as grounds for this application that the depositions and documents requested are material and relevant to this case and that it is essential to Massena to have these documents and take these depositions in order to prepare and prove its case in the above-captioned docket. Massena intends to establish in the above-captioned proceedings, inter alia, that Niagara Mohawk has to date refused to negotiate a contract to wheel power to Massena and that this refusal to deal is part of an interstate program and combination to unlawfully monopolize the electric utility industry and that the revenues Niagara Mohawk would receive from the filing herein would be unlawfully used by Niagara Mohawk to achieve and strengthen its monopolistic position over transmission in the Massena service area.

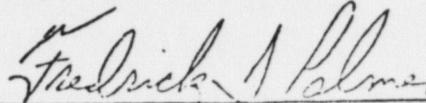
5. Section 307(b) of the Federal Power Act, as supplemented by Sections 1.23 and 1.24 of the Commission's Rules of Practice and Procedure indicate that this Commission is empowered to issue subpoenas and to order the taking of depositions. Upon a proper showing of relevancy and materiality, the Commission should order that the requested discovery procedures commence. Cf. Sec. 6, Administrative Procedure Act, 5 U.S.C. §555(d) (1970). Unless it is clear that the requested information is neither relevant nor material, the requested discovery order should issue. See, Cities Service Gas Co., 32 FPC 1258, 1261 (1964); Pure Oil Co., 21 FPC 646, 648 (1959).

## NOTICE AND APPLICATION FOR DEPOSITIONS

-12-

WHEREFORE, for the foregoing reasons, Massena respectfully requests that this Commission issue subpoenas duces tecum requested above and attached hereto as Appendices A through C and that the Commission order the depositions herein requested to commence.

Respectfully submitted,



FREDRICK D. PALMER  
Duncan, Brown, Weinberg & Palmer  
1700 Pennsylvania Ave., N.W.  
Washington, D.C. 20006

Attorney for Massena, New York

November 25, 1975



## NOTICE AND APPLICATION FOR DEPOSITIONS

VERIFICATION

City of Washington       )  
                              )   SS:  
District of Columbia     )

FREDRICK D. PALMER, being first duly sworn, deposes and says that he is the attorney for the Town of Massena, New York, that he is familiar with the facts, circumstances and matters alleged and set forth herein; that he has read this document, and that said facts, circumstances and matters are true and correct to the best of his knowledge, information and belief.

  
FREDRICK D. PALMER

Subscribed and sworn to before me this \_\_\_\_\_ day of November, 1975.

\_\_\_\_\_  
Notary Public

My Commission Expires August 14, 1979  
\_\_\_\_\_

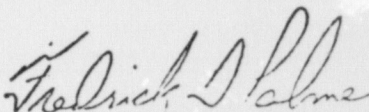
---

NOTICE AND APPLICATION FOR DEPOSITIONS

---

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon all parties of record in accordance with the requirements of Section 1.17 of the Rules of Practice and Procedure, this 25<sup>th</sup> day of November, 1975.

  
FREDRICK D. PALMER

Dated: November 25, 1975



130a  
**APPENDIX A TO NOTICE  
AND APPLICATION FOR DEPOSITIONS**

APPENDIX A

UNITED STATES OF AMERICA  
FEDERAL POWER COMMISSION

**Subpoena Duces Tecum**

In re: NIAGARA MOHAWK POWER CORPORATION ) Docket No. E-9379

To John G. Haehl, Jr., President, Niagara Mohawk Power  
Corporation, 300 Erie Boulevard West, Syracuse, N.Y. 13202

YOU ARE HEREBY required to appear before David Robinson, Supreme Court Reporter, or his designated  
associate

~~the Federal Power Commission~~, at Niagara Mohawk Power Corporation, 300  
Erie Boulevard, West

in the city of Syracuse, New York  
on the 9th, and perhaps 10th day of December, 19 75, at 10 o'clock A. m.  
of that day, to testify give deposition as to matters listed in the Notice  
and application hereto attached.

And you are hereby required to bring with you and produce at said time and place the following:  
The documents listed in the Notice and Application attached  
hereto.

IN WITNESS WHEREOF, the undersigned, being duly and lawfully authorized so to do, has hereunto  
set his hand at \_\_\_\_\_, this \_\_\_\_\_ day of  
\_\_\_\_\_, 19\_\_\_\_

Fail not at your peril.

(Title)

IN TESTIMONY WHEREOF, the seal of the Federal Power Commission has  
(IMPRESS SEAL HERE) been affixed hereto this \_\_\_\_\_ day of \_\_\_\_\_,  
19\_\_\_\_

NOTICE TO WITNESS.—If claim is made for witness fee or mileage, this subpoena should accompany voucher.

131a  
APPENDIX B TO NOTICE  
AND APPLICATION FOR DEPOSITIONS

APPENDIX B

UNITED STATES OF AMERICA  
FEDERAL POWER COMMISSION

*Subpoena Duces Tecum*

In re: NIAGARA MOHAWK POWER CORPORATION) Docket No. E-9379

To Lauman Martin, Senior Vice President, Niagara Mohawk Power  
Corporation, 300 Erie Boulevard West, Syracuse, N.Y. 13202

YOU ARE HEREBY required to appear before David Robinson, Supreme Court Reporter, or his designated  
associate  
~~the Federal Power Commission~~, at Niagara Mohawk Power Corporation, 300  
Erie Boulevard, West  
in the city of Syracuse, New York  
on the 9th and perhaps 10th day of December, 19 75, at 10 o'clock a. m.  
of that day, to ~~appear~~ give deposition as to matters listed in the Notice  
and application hereto attached.

And you are hereby required to bring with you and produce at said time and place the following:  
The documents listed in the Notice and Application attached  
hereto.

IN WITNESS WHEREOF, the undersigned, being duly and lawfully authorized so to do, has hereunto  
set his hand at \_\_\_\_\_, this \_\_\_\_\_ day of  
\_\_\_\_\_, 19\_\_\_\_.

Fail not at your peril.

(Title)

IN TESTIMONY WHEREOF, the seal of the Federal Power Commission has  
[IMPRESS SEAL HERE] been affixed hereto this \_\_\_\_\_ day of \_\_\_\_\_,  
19\_\_\_\_.

NOTICE TO WITNESS.—If claim is made for witness fee or mileage, this subpoena should accompany voucher.



**APPENDIX C TO NOTICE  
AND APPLICATION FOR DEPOSITIONS**

## APPENDIX C

UNITED STATES OF AMERICA  
FEDERAL POWER COMMISSION

**Subpoena Duces Tecum**

In re: NIAGARA MOHAWK POWER CORPORATION ) Docket NO. E-9379

To James J. Miller, Vice President, Niagara Mohawk Power Corporation, 300 Erie Boulevard West, Syracuse, N.Y. 13202

YOU ARE HEREBY required to appear before David Robinson, Supreme Court Reporter, or his designated associate,  
the Federal Power Commission, at Niagara Mohawk Power Corporation, 300 Erie Boulevard, West  
in the city of Syracuse, New York  
on the 9th and perhaps 10th day of December, 1975, at 10 o'clock a. m.  
of that day, to testify give deposition as to matters listed in the Notice and Application hereto attached.

And you are hereby required to bring with you and produce at said time and place the following:  
The documents listed in the Notice and Application attached hereto.

IN WITNESS WHEREOF, the undersigned, being duly and lawfully authorized so to do, has hereunto set his hand at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_

Fail not at your peril.

(Title)

IN TESTIMONY WHEREOF, the seal of the Federal Power Commission has  
[IMPRESS SEAL HERE] been affixed hereto this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_

NOTICE TO WITNESS.—If claim is made for witness fee or mileage, this subpoena should accompany voucher.

## PETITION FOR REVIEW

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

NIAGARA MOHAWK POWER CORPORATION,

Petitioner,

-against-

PETITION FOR REVIEW

FEDERAL POWER COMMISSION,

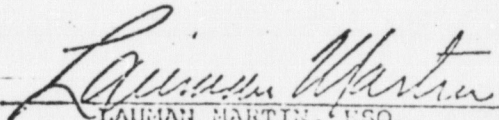
75-4263

Respondent.

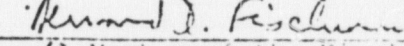
Petitioner NIAGARA MOHAWK POWER CORPORATION hereby petitions the Court for review of the Federal Power Commission order entitled Order Denying Rehearing and Modifying Procedural Dates, Issued November 13, 1975, in its Docket No. E-9379 and, thereby, of the order of the Federal Power Commission entitled Order Denying Motion to Dismiss Investigation, Issued September 25 1975 in the aforesaid Docket No. E-9379.

Petitioner has its principal place of business in the City of Syracuse, New York.

Dated: New York, New York  
December 1, 1975

  
LAUMAN MARTIN, ESQ.  
300 Erie Boulevard West  
Syracuse, New York 13202

SHEA GOULD CLIMENKO KRAMER & CASEY

By   
(A Member of the Firm)  
330 Madison Avenue  
New York, New York 10017

Attorneys for Petitioner



File: 12-2-75 17th Fl.  
Circuit Court (Sec. 2)  
9 C. 1005

134a

PETITION FOR REVIEW

INDEX NO.

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

NIAGARA MOHAWK POWER CORPORA-  
TION,

Petitioner,

-against-

FEDERAL POWER COMMISSION,

Respondent.

PETITION FOR REVIEW

SHEA GOULD CLIMENKO KRAMER & CASEY  
330 MADISON AVENUE  
NEW YORK, N. Y. 10017

MO 1-3200

ATTORNEYS FOR Petitioner

FEDERAL POWER COMMISSION  
LETTER OF DECEMBER 3, 1975

FEDERAL POWER COMMISSION  
WASHINGTON, D.C. 20426  
December 3, 1975

IN REPLY REFER TO:

Niagara Mohawk Power  
Corporation  
Docket No. E-9379

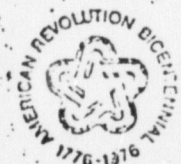
Gentlemen:

Having contacted counsel for Niagara Mohawk Power Corporation and the Town of Massena, New York by telephone, it appears that a conference at this time may serve some useful purpose. Accordingly, please be informed that Commission Staff is convening an informal conference for the purpose of discussing the issues raised by Massena with a view toward settling this proceeding. The conference will be held in Room 8402 of the Federal Power Commission offices, 825 North Capitol Street, N. E., Washington, D. C. 20426, at 11:00 a.m. on Friday, December 12, 1975.

All parties in attendance will be expected to come fully prepared to discuss all issues involved in this proceeding, both procedural and substantive, and to make commitments with respect to such issues and any offers of settlement or stipulations discussed at the conference.

Customers and other interested persons will be permitted to attend, but if such persons have not previously been permitted to intervene by order of the Commission, attendance at the conference will not be deemed to authorize intervention as a party in this proceeding. A petition to intervene filed pursuant to Section 1.8 of the Commission's Rules of Practice and Procedure is required for that purpose.

Counsel for Massena has informed me that he will move to stay his outstanding application for depositions in this proceeding pending the outcome of the conference.





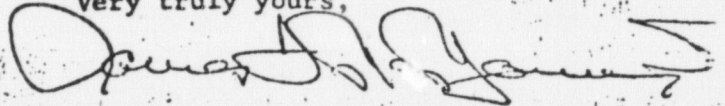
FEDERAL POWER COMMISSION  
LETTER OF DECEMBER 3, 1975

Docket No. E-9379

-2-

If I may be of further assistance in this matter please  
feel free to call.

Very truly yours,



James T. McManus  
Commission Staff Counsel  
(202) 275-4241

cc: (1) All Parties  
(2) Bertram Moll, Esq.  
(3) Donal F. McCarthy, Esq.  
(4) Mr. John L. Kennedy

FEDERAL POWER COMMISSION ORDER  
ISSUED DECEMBER 22, 1975

APPENDIX E

UNITED STATES OF AMERICA  
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman;  
Don E. Smith, John H. Holloman III,  
and James G. Watt.

Niagara Mohawk Power  
Corporation

)  
)

Docket No. E-9379

## ORDER DENYING APPLICATION FOR STAY

(Issued December 22, 1975)



On November 26, 1975, Niagara Mohawk Power Corporation (Niagara) filed its application for stay of two Commission orders in order to pursue judicial review of those orders as provided in 16 U.S.C. §825 L (Section 313 of The Federal Power Act). Those subject orders are our November 13, 1975, Order Denying Rehearing and Modifying Procedural Dates and our September 25, 1975, Order Denying Motion to Dismiss Investigation.

Niagara states that it requests such stay upon the ground that the procedural dates established in Ordering Paragraph (B) of our November 13, 1975, order requires compliance with the subject orders before judicial review may be had, which Niagara contends prejudices them and renders judicial review ineffective. Niagara states no grounds for seeking judicial review, but refers us to its application for rehearing of our September 25, 1975, order, which we denied by order issued November 26, 1975.



FEDERAL POWER COMMISSION ORDER  
ISSUED DECEMBER 22, 1975

Docket No. E-9379

- 2 -

By an errata notice issued December 2, 1975 to the notice of extension of procedural dates issued November 26, 1975, the Secretary established the following procedural dates in this proceeding:

Service of Intervenor Testimony	December 29, 1975
Service of Staff Testimony	January 19, 1976
Service of Company Rebuttal	February 9, 1976
Hearing	March 1, 1976 (10:00 a.m., EST)

On December 3, 1975, the Town of Massena, New York (Massena) filed a "memorandum" opposing Niagara's motion for stay. Massena contends that Niagara's motion ought to be rejected for failing to allege or establish facts sufficient to satisfy the criteria for a stay of proceedings pendante lite established in Virginia Jobbers. 1/

In particular, Massena states that Niagara has failed to show that it has a likelihood of success on the merits of the appeal, that it will suffer irreparable harm if the orders are not stayed, that the issuance of a stay would not substantially harm other parties and that the issuance of a stay is in the public interest. Furthermore, Massena states that Niagara has not yet filed for review with the Court of Appeals making Niagara's application here

1/ Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F. 2d 921 (D.C. Cir. 1958, per curiam).

FEDERAL POWER COMMISSION ORDER  
ISSUED DECEMBER 22, 1975

Docket No. E-9379

- 3 -

premature. Massena maintains that for failure to comply with Virginia Jobbers and to state reasons in support of its application, that Niagara's motion for stay ought to be denied.

Niagara filed a reply to Massena's memorandum on December 11, 1975, stating that it had petitioned for review of our orders and that it believes we can stay our own order in order to prevent irreparable injury to Niagara.

We agree with Massena. In its Application, Niagara adduces no reasons to warrant grant of its Application. Similarly, nothing contained in Niagara's Application for Rehearing of our September 25 order or in its December 11 Reply to Massena persuade us to stay our orders. Accordingly, we shall deny Niagara's application for stay of our previous orders in this proceeding.

The Commission finds:

Good cause exists to deny Niagara's application for stay of our November 13, 1975, order.

The Commission orders:

(A) Niagara's application for stay of our order issued November 13, 1975, in this proceeding is denied.

(B) The Secretary shall cause prompt publication of this order in the Federal Register.

By the Commission.

( S E A L )

Kenneth F. Plumb,  
Secretary.



MASSENA'S MOTION TO EXTEND PROCEDURAL DATES

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL POWER COMMISSION

NIAGARA MOHAWK POWER CORPORATION ) DOCKET NO. E-9379

MOTION OF THE  
TOWN OF MASSENA, NEW YORK  
TO EXTEND PROCEDURAL DATES

By Order of this Commission dated November 26, 1975, and corrected on December 2, 1975, the following schedule of procedural dates was established for this proceeding:

Service of Intervenor's Testimony  
December 29, 1975

Service of Staff's Testimony  
January 19, 1976

Service of Company's Niagara Mohawk Rebuttal  
February 9, 1976

Hearing  
March 1, 1976

On November 25, 1975, the Town of Massena, New York (Massena) filed with the Commission a "Notice and Application for Depositions and Application for Issuance of Subpoenas for Deposition and Production of Documentary Evidence" in order to commence discovery needed to establish its case in this proceeding.

## MASSENA'S MOTION TO EXTEND PROCEDURAL DATES

- 2 -

Subsequent to the filing of this Notice and Application, Massena was contacted by Staff Counsel in order to schedule an informal meeting between the parties in hopes of settling the matter here.

In order to conserve the efforts of this Commission and, hopefully, to foster the success of the informal meeting scheduled for December 12, 1975, Massena filed on December 5, 1975, a Motion to postpone indefinitely the issuance of subpoenas.

The informal meeting was held on December 12, 1975. However, no resolution of the substantive issues raised herein occurred.

Massena must now reissue a notice and Application for Depositions and for the Issuance of Subpoenas. The information sought in these depositions and subpoenas is necessary for Massena to properly prepare its case in this proceeding.

Massena respectfully requests that the procedural dates be extended and established as follows:

Service of Intervenor's Testimony  
February 28, 1976

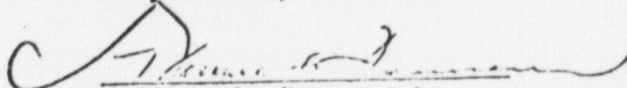
Service of Staff's Testimony  
March 15, 1976

Service of Company's Niagara Mohawk Testimony  
April 5, 1976

Hearing  
May 1, 1976

WHEREFORE, Massena respectfully requests that the extension of time with the proposed dates set out above be granted.

Respectfully submitted,

  
Wallace L. Duncan

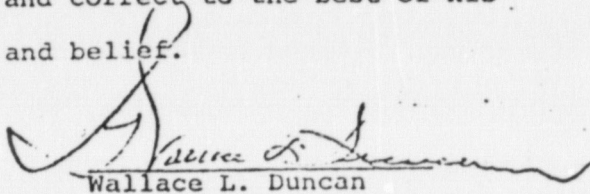


## MASSENA'S MOTION TO EXTEND PROCEDURAL DATES


- 3 -

VERIFICATION

WALLACE L. DUNCAN, being first duly sworn, deposes and says on oath that he is the attorney for the Town of Massena, New York, and that as such he has read the foregoing document; that he understands the same and verily believes it to be true and correct to the best of his knowledge, information and belief.

  
Wallace L. Duncan

Subscribed and sworn to before  
me this 24th day of DECEMBER,  
1975.

  
Notary Public

My Commission Expires:

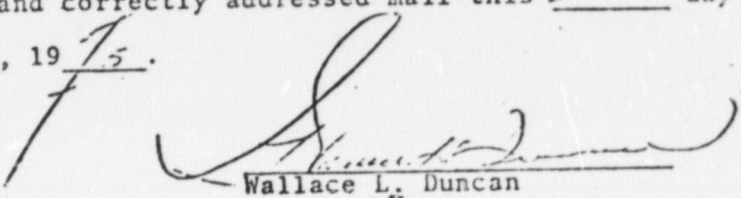
MY COMMISSION EXPIRES MARCH 14, 1979

MASSENA'S MOTION TO EXTEND PROCEDURAL DATES

- 4 -

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been served upon all parties of record via first class, postage prepaid and correctly addressed mail this 29<sup>th</sup> day of December, 19 75.

  
Wallace L. Duncan



144a  
APPLICATION FOR AN ORDER  
DIRECTING THE ESTABLISHMENT  
OF PHYSICAL CONNECTION OF FACILITIES

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL POWER COMMISSION

-----  
NIAGARA MOHAWK POWER CORPORATION )  
-----

Docket No.

APPLICATION FOR AN ORDER  
DIRECTING THE ESTABLISHMENT  
OF PHYSICAL CONNECTION OF FACILITIES

Wallace L. Duncan  
Fredrick D. Palmer

✓ DUNCAN, BROWN, WEINBERG &  
PALMER  
1700 Pennsylvania Ave., NW  
Washington, D. C. 20006  
(202) 296-4325

February 4, 1976

APPLICATION FOR AN ORDER  
DIRECTING THE ESTABLISHMENT  
OF PHYSICAL CONNECTION OF FACILITIES

UNITED STATES OF AMERICA

BEFORE THE

FEDERAL POWER COMMISSION

-----  
NIAGARA MOHAWK POWER CORPORATION )  
-----

Docket No.

APPLICATION FOR AN ORDER  
DIRECTING THE ESTABLISHMENT  
OF PHYSICAL CONNECTION OF FACILITIES

COMES NOW the Town of Massena, New York (Massena) pursuant to §202(b) of the Federal Power Act (16 U.S.C. §824a(b) and §32.1 of the Regulations under the Federal Power Act and applies for an Order directing the Niagara Mohawk Power Corporation (Niagara Mohawk) to establish physical connection of its facilities with the facilities to be possessed and operated by Massena as hereinafter set forth.

I

Service List

The names, titles and addresses to whom correspondence should be sent regarding this Application are:

Edward J. Kaneb, Chairman  
Massena Electric Utility Board  
Highland Road  
Massena, New York 13662

Sterling Brownell, Member  
Massena Electric Utility Board  
20 Ridgewood Avenue  
Massena, New York 13662



APPLICATION FOR AN ORDER  
DIRECTING THE ESTABLISHMENT  
OF PHYSICAL CONNECTION OF FACILITIES

- 2 -

Tony DiIorio, Member  
Massena Electric Utility Board  
28 Randall Drive  
Massena, New York 13662

Robert Squires, Member  
Massena Electric Utilities Board  
41 Churchill Avenue  
Massena, New York 13662

Charles Smith  
Town Supervisor  
Town Hall  
Massena, New York 13662

Eugene L. Nicandri, Esquire  
Lavigne & Nicandri  
57 East Orvis Street  
Massena, New York 13662

Fredrick D. Palmer, Esquire  
Duncan, Brown, Weinberg & Palmer  
1700 Pennsylvania Ave., NW  
Washington, D. C. 20006

II

Description of the Parties

The Town of Massena, New York is a municipal corporation as defined under the laws of the State of New York. Massena is located in the County of St. Lawrence and lies adjacent to the St. Lawrence River. Massena's population is approximately 16,000 and its economic base consists of three major industrial facilities along with recreational activities and related services based on the St. Lawrence River and Lake St. Lawrence formed by one of two hydroelectric facilities owned and operated by the Power Authority of the State of New York (PASNY).

Niagara Mohawk currently serves electric power

APPLICATION FOR AN ORDER  
DIRECTING THE ESTABLISHMENT  
OF PHYSICAL CONNECTION OF FACILITIES

- 3 -

and energy to the residents of Massena at retail under rates, terms and conditions of service approved or prescribed by the Public Service Commission of the State of New York. Niagara Mohawk currently realizes approximately \$2,011,000 in revenues from sales at retail within Massena.

Niagara Mohawk is interconnected with PASNY and other utilities that do business in New York and in other states. Niagara Mohawk is subject to the jurisdiction of this Commission and, so far as Massena is able to discern, currently has in effect three separate rate schedules applicable to jurisdictional sales. These are designated FPC Rate Schedule(s) R-1, 24 and 25.

III

The Pending Condemnation Action

To avail itself of its statutory right to low cost hydroelectric power and energy generated and sold by PASNY, the residents of Massena, on May 30, 1974, voted affirmatively on a referendum authorizing Massena to acquire appropriate electric distribution and transmission facilities of Niagara Mohawk for the purpose of owning and operating a municipal electric system.

Negotiations for the orderly transfer of the facilities proved fruitless and, as a result, Massena commenced a condemnation proceeding in the County Court, County of St. Lawrence, on March 13, 1975. That matter is sub judice and an early resolution of the litigation is not in prospect. However,



APPLICATION FOR AN ORDER  
DIRECTING THE ESTABLISHMENT  
OF PHYSICAL CONNECTION OF FACILITIES

- 4 -

under §24 of the Condemnation Law of the State of New York, Massena is entitled, by motion, to seek possession of Niagara Mohawk's facilities prior to final order of the Court transferring title.

It is Massena's intention, and Massena so commits, to file an appropriate motion for preliminary possession with the Court within five working days of the filing of this Application. In said motion, Massena will seek takeover as of April 1, 1976. Massena commits to keep this Commission fully informed as to the status of the proceeding. Upon filing of said motion, Massena will supplement the instant application with a copy thereof.

IV

Negotiations with PASNY

Through its Massena Electric Utility Board, Massena has requested commencement of formal negotiations with PASNY for an allocation of power and energy. By letter dated January 22, 1976 (Exhibit A), Edward J. Kaneb, the Chairman of MEUB, has requested that power and energy be available as of April 1, 1976. Negotiations will commence shortly and Massena is confident that power will be available by that date. Massena commits to keep this Commission fully informed on the status of negotiations and the date of availability of PASNY power and energy.

APPLICATION FOR AN ORDER  
DIRECTING THE ESTABLISHMENT  
OF PHYSICAL CONNECTION OF FACILITIES

- 5 -

V

The Role of this Commission

While the feasibility of a municipal utility in Massena is premised on the availability of power and energy from PASNY, and while it is necessary for Niagara Mohawk to agree to transmit PASNY power and energy over Niagara Mohawk's transmission facilities, Massena does not seek a Commission order here requiring Niagara Mohawk to make available its transmission lines for wheeling to Massena. Rather, Massena seeks only an order directing Niagara Mohawk to interconnect its facilities with Massena upon takeover, and establishing rates, terms and conditions of service for wholesale power service by Niagara Mohawk to Massena for any necessary interim period.

As the Commission is aware, there is now pending in Docket No. E-9379 an investigation of Niagara Mohawk's alleged refusal to commit to transmission for Massena and Niagara Mohawk's systemwide transmission practices. Massena contends there that this Commission does have jurisdiction to order Niagara Mohawk to "wheel", but Massena recognizes that the issue is not free of doubt. While not recognizing a lack of jurisdiction in this Commission, Massena believes that the issue need not be decided in the context of this Application. Massena further believes that a deferral of the investigation in E-9379 is in order inasmuch as events in the next two months



APPLICATION FOR AN ORDER  
DIRECTING THE ESTABLISHMENT  
OF PHYSICAL CONNECTION OF FACILITIES

- 6 -

may render the matter moot.

Massena's position is predicated on two premises: First, Massena will not assume ill will and illegal motive on Niagara Mohawk's part. Massena assumes for the purpose of this Application that Niagara Mohawk will agree to wheel PASNY power and energy to Massena when that power and energy is available, the County Court has allowed preliminary takeover, and this Commission has ordered an appropriate interconnection of facilities.

Second, if Niagara Mohawk still refuses to wheel once power and energy is available, the County Court has ordered a takeover and once this Commission has ordered an interconnection, Massena will suffer temporary economic harm, but will greatly benefit over a longer period of time.

As can be seen from Exhibit B, page 3, Column 1, Massena estimates purchased power costs from PASNY for the full first year of operation at \$490,592 based on present consumption, PASNY rates, a "postage stamp" transmission charge imposed by PASNY for the benefit of the transmission utility, and an additional facilities charge to be paid by Massena to Niagara Mohawk. As near as Massena is able to discern, if Massena must take power and energy from Niagara Mohawk for a period of one year under rates substantially similar to its current jurisdictional rates, Massena would pay Niagara Mohawk \$1,039,976 (Exhibit B, page 3, Column 5) for purchased power costs, or \$549,384 in excess of the PASNY charge.

APPLICATION FOR AN ORDER  
DIRECTING THE ESTABLISHMENT  
OF PHYSICAL CONNECTION OF FACILITIES

- 7 -

Again assuming arguendo, illegality on the part of Niagara Mohawk, it is submitted that there could be no clearer violation of the antitrust laws. The sum of \$569,384 trebled is \$1,648,152. Massena is thus content to take its chances with Niagara Mohawk on transmission independent of this Commission. See Otter Tail Power Company v. United States, 410 U.S. 366 (1973).

VI

Massena's Plan of Operation

As can be seen in Exhibit C, the MEUB has adopted an operating plan designed to provide administrative machinery for the operation of a municipal utility. It is not necessary to replicate the exhibit in the body of this Application, but briefly stated, the plan is premised on the retention of qualified consulting and contract personnel to provide all services on an interim basis, to be phased out as qualified personnel are hired. Massena submits the plan is viable and not subject to criticism.

VII

Massena's Interconnection Plan

Massena's proposed interconnection plan is described in Exhibit D and is self-explanatory. Again, by way of brief explanation, the plan is premised on economy, reliability and the avoidance of installing duplicative distribution, sub-transmission and transmission facilities.



APPLICATION FOR AN ORDER  
DIRECTING THE ESTABLISHMENT  
OF PHYSICAL CONNECTION OF FACILITIES

- 8 -

The logic in the approach is clear to Massena: the Massena area and surrounding environs has been served at adequate voltage levels for some time. While Niagara Mohawk's distribution system is susceptible of improvement, there is no reason why the physical facilities need be altered in any substantial way given the fact that two responsible utilities will commit to each other to cooperate in providing reliable service one to the other. This is hardly a unique concept in New York, given the coordination and cooperation that is a fact of life among investor-owned utilities, PASNY and existing municipal utilities.

To the extent Niagara Mohawk incurs any reasonable expenses associated with actual physical reconstruction work, Massena hereby commits to reimburse Niagara Mohawk (excluding, of course, administrative expenses, which are never charged by utilities interconnecting one with the other in an arms' length transaction).

VIII

Benefits to Massena  
by Virtue of Municipalization

As can be seen from Exhibit B, consumers in Massena will conservatively save 22% on their electric bills during the full first year of operation. Included in purchased power costs is \$100,000 for use of Niagara Mohawk's subtransmission facilities. This or any such amount is subject to re-

APPLICATION FOR AN ORDER  
DIRECTING THE ESTABLISHMENT  
OF PHYSICAL CONNECTION OF FACILITIES

- 9 -

view and approval by this Commission, and Massena believes it to be on the uppermost side of "reasonableness." Not included is a facilities charge which will be due Massena from Niagara Mohawk. While this Commission does not have jurisdiction over the latter, Massena hereby submits to jurisdiction to allay any objection by Niagara Mohawk that Massena will demand an unreasonable amount. If Niagara Mohawk objects to Massena's submission of jurisdiction to this Commission, Massena further commits to compute the facilities charge due it in a fashion identical to terms and conditions set by this Commission for the facilities charge due Niagara Mohawk.

IX

Capacity of Niagara  
Mohawk to Serve Massena

In all of Massena's myriad dealings with Niagara Mohawk, it has never been alleged by the Company that it lacks transmission capacity to facilitate interconnection with Massena. If the assertion is raised here for the first time, one basic fact should be kept in mind. Niagara Mohawk has been serving Massena at retail for many years. A Massena takeover places no greater burden on Niagara Mohawk than presently exists. Massena stands ready to compensate Niagara Mohawk for all services, and, as a result, Niagara Mohawk will not only not suffer, it should benefit due to the substantially reduced administrative expenses associated with dealing with one customer (Massena) as opposed



APPLICATION FOR AN ORDER  
DIRECTING THE ESTABLISHMENT  
OF PHYSICAL CONNECTION OF FACILITIES

- 10 -

to many.

X

Conclusion

WHEREFORE, for the reasons stated herein, Massena respectfully requests that this Commission enter an ORDER establishing interconnection of Massena's facilities with those of Niagara Mohawk under terms and conditions requested herein or under such terms and conditions found just and reasonable by this Commission, said interconnection to be effective April 1, 1976, or as soon thereafter as Massena demonstrates an allocation of PASNY power and energy and legal authority to possess the facilities of Niagara Mohawk under the Condemnation Laws of the State of New York.

Massena further requests a deferral of proceedings in E-9379 pending resolution of this Application.

Respectfully submitted,



Fredrick D. Palmer  
DUNCAN, BROWN, WEINBERG &  
PALMER

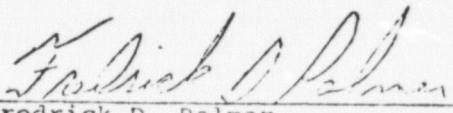
1700 Pennsylvania Ave., NW  
Washington, D. C. 20006

APPLICATION FOR AN ORDER  
DIRECTING THE ESTABLISHMENT  
OF PHYSICAL CONNECTION OF FACILITIES

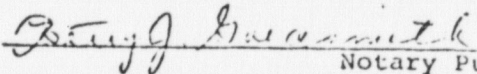
## VERIFICATION

City of Washington :  
District of Columbia :      ss:

FREDRICK D. PALMER, being first duly sworn, deposes and says that he is the attorney for the City of Massena, New York, and that he is authorized to execute and file the foregoing Application for an Order Directing the Establishment of Physical Connection of Facilities; that he has read said Application and is familiar with the contents thereof; and that all statements of fact therein set forth are true and correct, to the best of his knowledge, information and belief.

  
Fredrick D. Palmer

Subscribed and sworn to before me  
this 1<sup>st</sup> day of February, 1976.

  
Notary Public

My Commission expires April 14, 1978.



APPLICATION FOR AN ORDER  
DIRECTING THE ESTABLISHMENT  
OF PHYSICAL CONNECTION OF FACILITIES


CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of  
the foregoing Application for an Order Directing the Establish-  
ment of Physical Connection of Facilities by depositing copies  
thereof in the United States mail, postage prepaid, this  
4th day of February, 1976, addressed to:

Lauman Martin, Esquire  
Senior Vice President &  
General Counsel  
Niagara Mohawk Power Corporation  
300 Erie Boulevard West  
Syracuse, New York 13202

Bernard A. Fischman  
Shea, Gould, Climenko & Kramer  
330 Madison Avenue  
New York, New York 10017

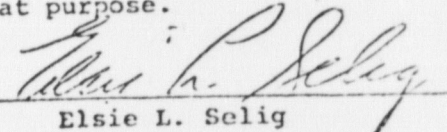
Milton S. Gould, Esquire  
Shea, Gould, Climenko & Kramer  
330 Madison Avenue  
New York, New York 10017

  
Fredrick D. Palmer

APPLICATION FOR AN ORDER  
DIRECTING THE ESTABLISHMENT  
OF PHYSICAL CONNECTION OF FACILITIES

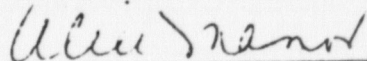
STATE OF NEW YORK     )  
                              : ss.:  
COUNTY OF NEW YORK    )

ELSIE L. SELIG                     , being duly sworn,  
deposes and says: that deponent is in the employ of SHEA  
GOULD MENKO KRAMER & CASEY, attorneys for Petitioner  
herein, is over 18 years of age, is not a party to this  
action, and resides at 301 East 69th St., New York, N.Y. 10021  
On the 19th day of February     , 19 76 deponent  
served the within AFFIDAVIT OF MILTON S. GOULD     on  
SEE ATTACHED LISTING             , Esq(s) ., attorney(s)  
for the SEE LISTING ATTACHED in the within entitled action,  
by depositing a true and correct copy of the same, properly  
enclosed in a postpaid wrapper in the official depository  
maintained and exclusively controlled by the United States  
Government at 330 Madison Avenue, New York, New York 10017  
that being the post office address of the attorneys for  
Petitioner                     , directed to said attorney(s) for  
SEE LISTING ATTACHED                     at No.  
SEE LISTING ATTACHED                     , that being the address  
designated by ~~(him)~~ (them) for that purpose.

  
Elsie L. Selig

Sworn to before me this

19th day of February , 19 76

  
\_\_\_\_\_



APPLICATION FOR AN ORDER  
DIRECTING THE ESTABLISHMENT  
OF PHYSICAL CONNECTION OF FACILITIES

Wallace Duncan, Esq.  
Frederick D. Palmer, Esq.  
Duncan, Brown, Weinberg & Palmer  
1700 Pennsylvania Ave. NW  
Washington, D.C. 20006

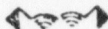
Drexel D. Journey, Esq.  
General Counsel  
Allan Abbott Tuttle, Solicitor  
Federal Power Commission  
Washington, D.C. 20426

Allan M. Garten, Esq.  
Federal Power Commission  
Washington, D.C. 20426

## ORDER GRANTING TOWN OF MASSENA LEAVE TO INTERVENE

## UNITED STATES COURT OF APPEALS

Second Circuit



At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 7th day of January, one thousand nine hundred and seventy-six.

---

Niagara Mohawk Power Corporation,

Petitioner,

v.

Federal Power Commission,

Respondent.

---

It is hereby ordered that the motion made herein by counsel for the

<del>Appellant</del>	Town of Massena, New York	<del>Respondent</del>
<del>xxxxxx</del>	<del>xxxxxx</del>	<del>xxxxxx</del>

~~by notice of motion~~ dated December 29, 1975 for leave to intervene

be and it hereby is granted

~~xxxxxx~~

GRANTED

~~It is further ordered that~~

---

William H. Timbermont, Judge